2798

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 256.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI AT THE RELATION AND TO THE USE OF CHRIS. GOTTLIEB, COLLECTOR OF THE REVENUE FOR JACKSON COUNTY, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED FEBRUARY 20, 1902.

(18,423.)

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Missouri, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Missouri at the relation and to the use of Chris Gottlieb, collector of the revenue for Jackson county, Missouri, plaintiff and appellant, and The Western Union Telegraph Company, defendant and appell*ant*, wherein was drawn in question the validity of an assessment for purposes of taxation made by the State board of equalization of the State of Missouri of the property of said Western Union Telegraph Company and which assessment it was claimed by said telegraph company was of franchises granted it by the Government of the United States and non-taxable and the assessment and taxation of which was violative of the laws of the United States and the Constitution of the United States and the decision was in favor of the validity of said assessment and taxation, and wherein was drawn the question of the validity of an assessment for purposes of taxation of the property of said telegraph company which it was alleged and claimed violated the fourteenth amendment to the Constitution of the United States, for the reason that said assessment and taxation was upon the full and actual value of the property of said telegraph company, whereas other property, real and personal, in said State of Missouri, was equalized and adjusted by said State board of equalization for purposes of taxation at only 40 % of its true and actual value, and the decision was in favor of the validity of the assessment and taxation aforesaid of the property of said Western Union Tele-

2 graph Company and said decision was against the rights and privileges set up and claimed by said Western Union Telegraph Company under the laws and the Constitution of the United States a manifest error hath happened to the great damage of the said Western Union Telegraph Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date of the citation in this cause in the said Supreme Court of the United States, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of January in the year of our Lord, one thousand nine hundred and two.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States for the central division of the western judicial district of Missouri, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court, Central Division, Western Judicial District of Missouri.

Allowed by—

G. D. BURGESS,
Judge and Chief Justice of the Supreme Court of the State of Missouri.

3 *Return to Writ.*

STATE OF MISSOURI, *sct:*

In obedience to the command of the within writ, I herewith transmit to Supreme Court of the United States a duly certified copy of the record and proceedings in the within-entitled case together with all things concerning the same.

Seal of the Supreme Court of Missouri.

In witness whereof, I hereto subscribe my name and affix the seal of said court at the city of Jefferson this 11th day of February A. D. 1902.

JNO. R. GREEN,
Clerk Supreme Court of Mo.

3½ [Endorsed:] No. — State *ex rel.* Gottlieb coll'r &c. app. *vs.* Western Union Tel. Co. app. Writ of error. Filed Jan. 29 1902 Jno. R. Green clerk.

4 The United States of America to the State of Missouri *ex rel.* Chris Gottlieb, collector of the revenue for Jackson county, Missouri, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington thirty (30) days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Gavon D. Burgess, chief justice and judge

of the supreme court of the State of Missouri, this 29th day of January, in the year of our Lord, one thousand nine hundred and two.

G. D. BURGESS,
Chief Justice and Judge of the Supreme Court of the State of Missouri.

Service hereby accepted.

R. E. BALL AND
H. M. MERRIWETHER,
Attorneys for Def't in Error.

5 In the Supreme Court of Missouri.

STATE OF MISSOURI, *set:*

Be it remembered, that heretofore to wit, on the 28th day of February, 1901, there was filed in the office of the clerk of the supreme court of the State of Missouri, a certified copy of the judgment and order granting appeal, in the case of State of Missouri at the relation of Chris. Gottleib, collector of the revenue for Jackson county, Missouri, against The Western Union Telegraph Company, which said certified copy of the judgment and order granting appeal is in words and figures as follows, viz:

Be it remembered that on the 10th day of the regular January term, A. D. 1901, of the circuit court of Jackson county, State of Missouri, at Kansas City, the same being the 24th day of January, A. D. 1901, the following proceedings were had and made of record in the cause entitled:

STATE *ex Rel.* CHRIS GOTTLEIB, Collector, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant. } 38998.

This cause came on for hearing on the 15th day of January, 1901, at this the regular January term, according to its setting on the docket. The plaintiff appears by its attorneys, Hunter M. Merriwether, and E. C. Slevin. The defendant appears by its attorneys, J. V. C. Karnes, and Elenius Smith. And the jury having been waived the cause was taken up and considered by the court, and the court having heard the evidence offered by plaintiff and defendant and the arguments of counsel for both plaintiff and defendant the cause was taken under advisement, and now on this 24th day of January, 1901, the court having considered the pleadings, evidence and arguments of counsel for both plaintiff and defendant, and it appearing to the court that the assessment in this case was made by the State board of equalization of the property of the defendant company, and that the State board assessed the following

6 property as belonging to defendant on the first day of June, 1898, and subject to taxation for the year 1899, to wit:

6075.98 miles of poles at $71.50 per mile	$434,432.57
23766.34 miles of wire at 22.02 per mile	523,356.82
2375 instruments at 5.70 each	13,537.50
All other property	856,400.56
Total assessed valuation of the entire State	$1,827,727.45

And the court finds the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of said assessment the poles, wires and instruments of the value hereinbefore set forth.

And the court finds the fact to be from the evidence that in valuing "all other property" of defendant the State board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation and as to this item of the above-named valuation the court finds the issues for the defendant. It is therefore considered, ordered and adjudged by the court that the plaintiff recover of the defendant for its taxes for the year 1899 upon the assessment as made by the State board of equalization against the poles, wires and instruments of the defendant as above set forth. The items of said tax on the apportionment for the county of Jackson being the following amounts.

For State purposes	$117.40
For county purposes	164.37
For road purposes	20.54
For general county school purposes	214.95
For school-building purposes	1.74
For other school purposes	11.04
For Kansas City municipal purposes	57.13
For Independence municipal purposes	14.72
For Kaw township railroad purposes	1.18
For Blue township railroad purposes	2.75
7 Total	$605.82

together with interest upon the total amount so found to be due from the defendant at the rate of one per cent. per month from the first day of January, 1900, to date, amounting to $—. And also for two per cent. of the gross sum found to be due from defendant for the commissions of the collector of the revenue; and also a reasonable fee for the attorneys of the plaintiff, to be hereafter determined by the court and taxed as costs against the defendant.

It is further found by the court that the gross sum due from the defendant is a first lien against the property of the defendant in the county of Jackson and State of Missouri, and it is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the amount as above mentioned for its taxes for the year 1899, and for costs and interest thereon and that special execution issue to be levied out of the property of the defendant as above set forth.

Thereupon defendant files motion for a new trial of this cause and plaintiff also files motion for a new trial of this cause.

During the January term A. D. 1901, the same being the 26th day of January A. D. 1901, the following proceedings were had and made of record in the cause entitled:—

STATE OF MISSOURI *ex Rel.* CHRIS. GOTTLEIB, Collector,
v.
WESTERN UNION TELEGRAPH COMPANY. } 38998.

Now the motion of plaintiff for a new trial in this cause is by the court overruled. To which action of the court plaintiff excepts. Thereupon said plaintiff files affidavit for appeal herein, and the court allows said plaintiff — from the judgment of this court in this cause to the supreme court of the State of Missouri.

Whereupon the motion of defendant for a new trial in this cause is by the court overruled. To which action of the court the said defendant excepts.

8 Said defendant files its affidavit for appeal herein, said affidavit being made by J. V. C. Karnes, one of defendant's attorneys, and said defendant also files its appeal bond herein in the penal sum of $1500.00, with J. V. C. Karnes, and Edwin A. Krauthoff, sureties thereon, which bond is by the court approved. Thereupon the court allows said defendant an appeal from the judgment of this court in this cause to the supreme court of the State of Missouri.

STATE OF MISSOURI, } *ss:*
County of Jackson,

I, H. M. Stonestreet, clerk of the circuit court of Jackson county, State of Missouri, do hereby certify that the foregoing is a full, true and complete copy of judgment and order allowing appeal in the cause wherein State *ex rel.* Chris Gottleib is plaintiff, and Western Union Telegraph Company, is defendant, as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at office in Kansas City, Missouri, this 23rd day of February, A. D. 1901.

H. M. STONESTREET, *Clerk,*
By D. M. McCLANAHAN, *D. C.*

And afterwards to wit, on the 15th day of March, 1901, there was filed in the office of said clerk, the following abstract of record, which said abstract of record is in words and figures as follows, viz:

9 In the Supreme Court of Missouri, April Term, 1901.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLEIB, Collector, Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Appell*ant*.

Abstract of Record.

The petition in this case is as follows:

State of Missouri, suing at the relation and to the use of the collector of the revenue within and for the county of Jackson, alleges that Chris Gottleib is the legally qualified and acting collector of the revenue within and for the county and State aforesaid; that defendant is a corporation organized and existing according to law; that on the first day of June, A. D. 1898, defendant was, and ever since has continued to be, the owner and in control of the following-described telegraph property, to wit:

A certain system or line of telegraph wires and poles maintained and operated for transferring messages and general telegraph matter from a point or points in Kansas City, Missouri, to various points throughout the United States, the head office of said Western Union Telegraph Company in Kansas City, Missouri, being now located at the southwest corner of Seventh and Main streets, in Kansas City, Missouri; that the total valuation of said telegraph property, as assessed and equalized by the State board of assessment and equalization of railroad and telegraph property and apportioned to Jackson county for taxation, for the year 1899, was $80,972.80; that all of said property was then and there subject to taxation for State, county, school, and other purposes for the year 1899; that there was legally assessed and levied against said property for said year,
10 for State, county, school and other municipal purposes, the aggregate sum of $1,027.22; that of the taxes so assessed and levied, there is now due and unpaid

For State purposes	$202.43
For county purposes	283.40
For road purposes	35.41
For general county-school purposes	370.61
For school-building purposes	2.98
For school other purposes	19.03
For Kansas City municipal purposes	81.21
For Independence municipal purposes	25.38
For Kaw township railroad purposes	2.03
For Blue township railroad purposes	4.74
Total	$1,027.22

Which said sums the defendant has failed to pay as required by law.

That plaintiff is entitled to recover of defendant a penalty of 1 per cent. per month, on the amount due and unpaid, for the year

1899, from the first day of January, 1900, until the same shall be paid.

Plaintiff further states that the taxes so assessed and levied, are, by virtue of the laws of this State, a first lien on the telegraph property, wires and poles and telegraph instruments of the defendant.

Wherefore plaintiff prays judgment for the sum of $1,027.22, and penalty thereon, until the same shall be paid, and for reasonable attorneys' fees and for collector's commissions and for costs of this suit, and that the same be declared a lien of the State of Missouri and that said lien be enforced and said telegraph property, franchises, poles, wires, and instruments, or so much thereof as may be necessary, be sold to satisfy said judgment and costs, and that a special *fieri facias* be issued thereon against said property.

11 To which defendant filed the following

Answer.

1. Now comes The Western Union Telegraph Company, defendant in the above-entitled cause, and for answer to the petition in said cause, admits that Chris Gottleib is and was at all of the times in said petition mentioned the legally qualified and acting collector of the revenue within and for the county of Jackson and State of Missouri, and admits that defendant is and was at the times in said petition mentioned a corporation organized and existing according to law.

Admits, as in said petition alleged, defendant was and still is the owner and in control of certain telegraph property, and admits said property was assessed and equalized by the State board of equalization for the year 1899, at the sum of $80,972.80, and admits that the property aforesaid by it owned and located in said county of Jackson was subject to taxation for State, county, school and other purposes for the year 1899, but denies that there was legally assessed and levied against said property for said year the amount of taxes for the respective purposes in said petition set forth.

Admits that it has failed to pay the taxes in said petition set forth, but denies that plaintiff is entitled to recover said taxes and the penalty thereon as alleged in said petition, and denies that said taxes were levied or assessed in such manner as to constitute a prior or other lien as alleged in said petition on the property of defendant.

Wherefore, having fully answered, defendant prays to be hence dismissed with costs.

2. And for another and separate defense to the cause of action in plaintiff's petition set forth, defendant avers that, to wit, in the month of January, 1899, it caused to be presented to the State board of equalization of the State of Missouri a return duly sworn

12 to by the superintendent of defendant of all of the property owned by the defendant in the State of Missouri on the first day of June, 1898, for the purposes of taxation for the year 1899, and said return, among other things, showed that defendant owned in the said county of Jackson and State of Missouri on the said first day of

June, 1898, 168.47 miles of poles of the fair valuation of fifty dollars per mile, or the aggregate sum of $8,423.50, and on said last-mentioned date owned in the county of Jackson 1052.95 miles of wire, which said wire and all instruments and batteries used by defendant in its business of telegraphing were of the fair valuation of ten dollars per mile of wire, making an aggregate of $10,529.50. And so defendant avers that on, to wit, the said first day of June, 1898, all of its property of every kind and character in the said county of Jackson, except as hereinafter mentioned, subject to taxation under the laws of the State of Missouri, was of the fair aggregate valuation of $18,953. Defendant avers that on the said first day of June, 1898, the total of its property other than poles, wires, instruments and batteries in the said county of Jackson, and being property of the character of furniture, fixtures, horse and wagon and tools, did not exceed the fair aggregate valuation of one thousand dollars, and which property last aforesaid was in due form of law returned by defendant company for assessment and taxation for State and other purposes, and was by the proper local authorities of said Jackson county duly assessed at said sum of $1,000, and the taxes upon which assessment have been paid by defendant.

Defendant avers that, as required by law, said State board of equalization did thereafter proceed to adjust and equalize the valuation of real and personal property among the several counties in the State of Missouri, and did, among other things, proceed to determine the valuation of all property in the State of Missouri owned by this defendant on the first day of June, 1898. Defendant avers
13 that at said hearing it offered, through its agents and attorneys, to prove to the satisfaction of said State board of equalization that the fair aggregate value of all of defendant's property in the said State of Missouri on said first day of June, 1898, subject to taxation, was, as shown by the return, as aforesaid, made by defendant, the sum of $541,472.40, a copy of which said return is herewith filed and marked Exhibit "A." That said State board of equalization, ignoring the sworn return so made as aforesaid, by this defendant, and of the offer of defendant by competent testimony to establish the truthfulness of said return, did thereafter proceed to fix a valuation of the property of this defendant in the said State of Missouri on the first day of June, 1898, for the purposes of taxation as aforesaid, and to distribute such aggregate valuation among the counties and certain cities and towns in the State of Missouri, as required by law, and that the said State board of equalization did place upon the 6075.98 miles of poles, which defendant admits it then had in said State of Missouri, a valuation of $71.50 per mile, or an aggregate valuation of $434,432.57. That said State board of equalization did then place a valuation on the 23,767.34 miles of wire, which defendant admits it then had in the State of Missouri, at $22.02 per mile, or an aggregate of $523,356.82, and did then place upon 2,375 instruments, which it admits it then had in the State of Missouri, a valuation of $5.70 each, or an aggregate valuation of $13,537.50, and did then and there further place upon what it, said State board of equalization, did then and there designate as

"all other property" an aggregate valuation of $856,400.56, making a total valuation upon the property of this defendant as fixed by said State board of equalization as of said June 1, 1898, for purposes of taxation for the year 1899, of $1,827,727.45.

Defendant avers that said valuation so as aforesaid placed upon said property by said State board of equalization as to said poles, wires and instruments was grossly excessive, and that for the amounts so fixed respectively by said State board of equal-
14 ization defendant could on said June 1, 1898, as well as at the time said valuations were in fact fixed by said State board of equalization, have constructed and erected an entirely new system of poles, wires and instruments of the exact mileage and character of the poles, wires and instruments designated in the return of this defendant and in the assessment so made by the State board of equalization. And so defendant avers that said State board of equalization deliberately and intentionally ignored the fact that the system of poles, wires and instruments hereinbefore referred to were not new, but in various stages of deterioration and decay, and further ignored the fact that for the valuation so as aforesaid by them fixed an entirely new system of poles, wires and instruments of the mileage and character aforesaid could have been by this defendant constructed.

Defendant avers that said State board of equalization, with a full knowledge of the values of said poles, wires and instruments and with intent to injure this defendant by compelling it to pay an excessive and disproportionate share of State and local taxes, discriminated against this defendant, well knowing at the time that they were so doing, and so as aforesaid assessed the poles, wires and instruments of this defendant at far more than their true and actual value.

Defendant avers that under the law it was the duty of said board of equalization to adjust and equalize as aforesaid the valuation of all real and personal property in the State of Missouri, among the several counties in the State, and that during the period aforesaid it did so proceed to adjust and equalize such valuations. That said State board of equalization, by common arrangement, understanding and purpose among themselves, in fact did during the period aforesaid, in violation of the constitution and laws of said State of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property in
15 said State of Missouri, assess all property, to wit, other than the property of telegraph companies, at, to wit, from thirty-five to forty per cent. of its true value, whereby as to taxes levied upon real and personal property other than telegraph property in the State of Missouri this defendant was unlawfully and wrongfully discriminated against to the extent of sixty per cent. of the amount of taxes assessed by said State board of equalization and levied by the taxing officers of the State upon defendant in pursuance of such assessment.

Defendant avers that, to wit, on the said first day of June, 1898, it had no property in the State of Missouri subject to taxation, other than the poles, wires, and instruments aforesaid, excepting certain

furniture, fixtures, horses and wagons and property of like character, the aggregate market valuation of which did not on said day exceed the sum of five thousand dollars. That almost all of the property of the character last aforesaid was located in the cities of St. Louis, Kansas City, and St. Joseph in the State of Missouri, and was duly returned by defendant to the proper taxing and revenue officers of said cities respectively; that, to wit, the sum of $3,580.00 for said city of St. Louis, the sum of $1,000.00 for said city of Kansas City, and the sum of $50.00 for said city of St. Joseph, all for taxation for the year 1899, and the taxes duly assessed by the officers aforesaid have been paid by this defendant, and defendant avers that all of its other property in the State of Missouri of the character aforesaid outside of the three cities aforesaid is of less value than, to wit, the sum of $500.00. Defendant avers that in fact said State board of equalization, in assessing "all other property" of defendant at said sum of $856,400.56, did intend to and in fact assess the franchises of this company, and that the sum last aforesaid was intended to be and in fact was the valuation placed by said State board of equalization upon the franchises of defendant exercised in the State of Missouri.

16 Defendant avers that said State board of equalization, knowing that it had no power to assess the franchises of this defendant, did, for the purpose of concealing the truth with respect to the assessment of said franchises, designate the same as "all other property." Defendant avers that neither on said first day of June, 1898, nor prior nor subsequent thereto did it exercise or have any franchises in the State of Missouri in pursuance of grant from said State of Missouri or any municipal or territorial division thereof, but that all of its franchises of every kind and character are derived from the State of New York, in which said State said defendant was incorporated, and from the United States, and that all of the franchises by it exercised in said State of Missouri as aforesaid are exercised in pursuance of grants from the United States and from no other source. And so defendant avers that the attempt by said State board of equalization to assess the said franchises of defendant is illegal and in contravention of the Constitution and laws of the United States. Defendant further avers that the said State board of equalization, pursuant to law, did certify to the counties of the State of Missouri, including the county of Jackson, their respective shares and proportions or the aggregate assessment of $1,827,727.45 so as aforesaid illegally fixed by said State board, and that the amount so as aforesaid certified to the said Jackson county is as in said petition alleged.

Wherefore, having fully answered, defendant prays to be hence dismissed with costs.

3. And for another and further defense to the cause of action in said petition set forth, defendant avers that it is now, and before, and on, and since the twenty-fourth day of July, 1866, was and has been, a corporation chartered, created and organized in the State of New York, under the laws of the said State of New York, and that defendant owns, controls, or uses lines of telegraph in various parts of the United States and in the said county of Jackson, and con-

structed and maintained as hereinafter more particularly set
17 forth in the said county of Jackson and throughout the State of Missouri, over and along the post-roads of the said United States which have been declared to be such by law, and over, under and across navigable streams and waters of the United States adjoining and in the State of Missouri, to wit, the Mississippi and Missouri rivers; that on, to wit, the fifth day of June, in the year 1867, defendant duly accepted and thereafter, to wit, on the twelfth day of June, in said last-mentioned year, duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations required by law under and in accordance with the act of Congress of the United States of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes." Defendant avers that upon said filing it became entitled to and had and hath ever since had the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States, and by and under said act and acceptance and filing the said company became and hath ever since been bound and obliged to give priority over all other business to telegrams between the several departments of the Government of the United States and their officers and agents in their transmission over the lines of the said defendant, at such rates as the said Postmaster General has annually fixed or shall annually fix, and to sell all its telegraph lines, property and effects to the said United States at an appraised value to be ascertained by five competent, disinterested persons, two of whom shall be selected by said Postmaster General, two by defendant, and one by the four previously elected, and also liable to a penalty of not less than one hundred or more than one thousand dollars for each refusal or neglect to transmit any such telegraphic communications as are pro-
18 vided for by the aforesaid act or by title LXV of the Revised Statutes of the United States, or by the provisions of section 221 of said Revised Statutes, title "The Department of War," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms.

Defendant avers that its lines of telegraph aforesaid extend to and from the said county of Jackson and State of Missouri into and through most of the States and Territories of the United States and to the city of Washington, in the District of Columbia, and connect with those owned and established by the Government of the United States for public purposes, and that defendant is in close communication with other telegraph companies doing business in the said United States and other countries; and so defendant avers that the lines of telegraph erected and maintained by it in the said county of Jackson and State of Missouri, were so erected and have been and are maintained in pursuance of and subject to the provisions of the

laws of the United States aforesaid, and that it has submitted to and accepted the conditions aforesaid imposed by said laws, and has declared its purpose and desire to avail itself of the privileges granted by said laws aforesaid.

That since the filing of the written acceptance aforesaid, defendant has transacted its business in the State of Missouri, and does continually and constantly transmit from, into and through the said county of Jackson telegrams between departments of the Government of the United States and the officers and agents thereof at rates as aforesaid fixed by said Postmaster General, and for and between other persons residing in the different States of the United States and in foreign countries and over its lines maintained on and along said post-roads and over other lines of telegraph connected with
19 the lines of defendant in and through other parts and States of said United States and thereby became and was prior to the said year 1898 and at all times since has been an instrument of foreign and interstate commerce and a Government agent for the transmission of Government business and of messages between points in the said State of Missouri and points in other States and foreign countries. Defendant avers that all of the franchises by it exercised in the State of Missouri, prior to the said — 1898 and ever since have been exercised in pursuance of the rights granted to it as aforesaid by the act of Congress aforesaid and the Constitution and laws of the United States, and that no right, privilege or franchise of any kind or character has even been gra-ted to it by the said State of Missouri.

Defendant avers that the assessment, so as aforesaid made by the State board of equalization against this defendant, of the sum of $856,400.56, so as aforesaid purporting to be on account of "all other property" of defendant in the State of Missouri, is, in fact, an assessment for purposes of taxation solely on account of the franchises granted the defendant by the Constitution and laws of the United States, and defendant avers that the said State of Missouri is and was without power or authority to tax such franchises, and that the assessment last aforesaid so made by said State board of equalization is illegal and void.

Wherefore, having fully answered, defendant prays to be hence dismissed with costs.

At the trial of the case it was stipulated the same might proceed the same as if a replication had been filed denying the new matter set up in the answer. The case was tried at the January term of the circuit court of Jackson county, Missouri, the same being the 24th day of January, 1901, and there was entered of record on said day the following judgment:

This cause came on for hearing on the fifteenth day of January, 1901, at this the regular January term, according to its setting on the docket. The plaintiff appears by its attorneys, Hunter M. Meri-
20 wether and E. C. Slevin; the defendant appears by its attorneys, J. V. C. Karnes and Elenelous Smith. And a jury having been waived, the cause was taken and considered by the court,

and the court having heard the evidence offered by plaintiff and defendant and the arguments of counsel for both plaintiff and defendant the cause was taken under advisement, and now on this twenty-fourth day of January, 1901, the court having considered the pleadings, evidence and arguments of counsel for both plaintiff and defendant, and it appearing to the court that the assessment in this case was made by the State board of equalization of the property of the defendant company, and that the State board assessed the following property as belonging to defendant on the first day of June, 1898, and subject to taxation for the year 1899, to wit:

6,075.98 miles of poles at $71.50 per mile	$434,432.57
23,766.34 miles of wires at $22.02 per mile	523,356.82
2,375 instruments at $5.70 each	13,537.50
All other property	856,400.56
Total assessed valuation of the entire State	$1,827,727.45

And the court finds the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of said assessment, the poles, wires and instruments of the value hereinbefore set forth.

And the court finds the fact to be from the evidence that in valuing "all other property" of defendant the State board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation, and as to this item of the above-named valuation the court finds the issues for the defendant.

It is therefore considered, ordered and adjudged by the court that the plaintiff recover of the defendant for its taxes for the year 1899 upon the assessment as made by the State board of equaliza-
21 tion against the poles, wires and instruments of the defendant as above set forth. The items of said tax on the apportionment for the county of Jackson being the following amounts:

For State purposes	$117.40
For county purposes	164.37
For road purposes	20.54
For general county-school purposes	214.95
For school-building purposes	1.74
For other school purposes	11.04
For Kansas City municipal purposes	57.13
For Independence municipal purposes	14.72
For Kaw township railroad purposes	1.18
For Blue township railroad purposes	2.75
Total	$605.82

Together with interest upon the total amount so found to be due from the defendant at the rate one per cent. per month from the first day of January, 1900, to date, amounting to $—. And also for two per cent. of the gross sum found to be due from defendant for the

commissions of the collector of the revenue; and also a reasonable fee for the attorneys of the plaintiff, to be hereafter determined by the court and taxed as costs against the defendant.

It is further found by the court that the gross sum due from the defendant is a first lien against the property of the defendant in the county of Jackson and State of Missouri, and it is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the amount as above mentioned for its taxes for the year 1899, and for costs and interest thereon, and that special execution issue to be levied out of the property of the defendant as above set forth.

Thereupon defendant files motion for a new trial of this cause, and plaintiff also filed motion for a new trial of this cause.

During the January term, A. D. 1901, the same being the
22 twenty-sixth day of January, A. D. 1901, the following proceedings were had and made of record:

Now the motion of plaintiff for a new trial in this cause is by the court overruled. To which action of the court, plaintiff excepts. Thereupon said plaintiff files affidavit for appeal herein, and the court allows said plaintiff — from the judgment of this court in this cause to the supreme court of the State of Missouri.

Whereupon the motion of defendant for a new trial in this cause is by the court overruled. To which action of the court, the said defendant excepts. Said defendant files its affidavit for appeal herein, said affidavit being made by J. V. C. Karnes, one of the defendant's attorneys, and said defendant also files its appeal bond herein in the penal sum of $1500.00, with J. V. C. Karnes and Edwin A. Krauthoff, sureties thereon, which bond is by the court approved. Thereupon the court allows said defendant an appeal from the judgment of this court in this cause to the supreme court of the State of Missouri.

Thereafter at said January term, 1901, and on the twenty-third day of February, 1901, there was filed of record in said cause a bill of exceptions signed and sealed by the Honorable John W. Henry, before whom said cause was tried, said bill of exceptions being in words and figures as follows, to wit:

Bill of Exceptions.

Be it remembered, that on the fifteenth day of January, 1901, and at said January term, 1901, of said circuit court, the above-entitled cause coming on to be heard before the Honorable John W. Henry, judge of said court, the plaintiff appearing by its attorneys, H. M. Meriwether and Eugene C. Slevin, and the defendant appearing by its attorneys, Dickson & Smith and Karnes, New & Krauthoff, the following proceedings were had:

It was agreed between counsel that the case may proceed as if the formal reply denying the new matter set up in the answer
23 had been filed:

The plaintiff to sustain the issues upon its behalf then offered evidence as follows:

Mr. MEREIWETHER: I offer in evidence a stipulation with regard to the evidence.

Said stipulation is as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City, January Term, 1901.

STATE OF MISSOURI *ex Rel.* and to the Use of CHRIS GOTTLEIB, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant.

It is agreed that the tax book for the year 1899, designated as railroad tax book offered in evidence by plaintiff shall be *prima facie* evidence of the validity of the taxes thereon assessed for the year 1899, against defendant, Western Union Telegraph Company, without proof by plaintiff of any of the steps leading up to its execution and issuance, but nothing herein shall be taken as precluding defendant from introducing any competent and relevant evidence to sustain the issues on its behalf.

H. M. MERIWETHER,
Attorney for Plaintiff.
DICKSON & SMITH,
KARNES, NEW & KRAUTHOFF,
For Defendant.

Mr. MEREIWETHER: I now introduce the railroad tax book for the year 1899, showing the taxes against the Western Union Telegraph Company, on page 3677.

The entry offered is as follows:

Valuation, $80,972.80: apportionment to Independence, $3,383,63; apportionment to Kansas City, $6,767.27; county tax, $283.40; road tax, $35.41; county-school tax, $370.61; building school
24 tax, $2.98; other purposes school tax, $19.03; Kaw township railroad tax, $2.03; Blue township railroad tax, $4.74; Kansas City municipal tax, $81.21; Independence municipal tax, $25.38. Total tax, $1,027.22.

It was admitted by counsel that the tax book was certified.

The plaintiff here rested its case.

And thereupon the defendant, to sustain the issues upon its part, offered evidence as follows:

Mr. SMITH: We first offer, if your honor please, the following stipulation between counsel:

Said stipulation is as follows:

In the Circuit Court of Jackson County, at Kansas City, Missouri.

STATE OF MISSOURI *ex Rel.* and to the Use of CHRIS GOTTLEIB, Collector of the Revenue, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant.

For the purpose of the trial of the above-entitled cause, the following facts are admitted, but objections to the admission of such facts in evidence on the ground of incompetency, irrelevancy or immateriality or any other proper objection in law may be made at the trial.

First. It is admitted that defendant is now, and at the times mentioned in the petition in said cause was, and ever since the year 1854 has been a corporation, organized and existing under the laws of the State of New York.

Second. The defendant on, to wit, the 5th day of June, 1867, duly accepted and on, to wit, the 8th day of June, 1867, duly filed its acceptance with the Postmaster General of the United States of the provisions, restrictions and obligations required by law under and in accordance with the act of the Congress of the United States approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and that said acceptance has not been withdrawn, and that said company transmits telegrams for the Government between its departments and officers at rates annually fixed by the Postmaster General of the United States.

Third. It is admitted that defendant is not incorporated under the laws of the State of Missouri and has never applied for or secured from the State of Missouri a license authorizing it to do business within the State of Missouri, under the laws of said State.

H. M. MERIWETHER,
Attorney for Plaintiff.
KARNES, NEW & KRAUTHOFF,
DICKSON & SMITH,
Attorneys for Defendant.

Mr. MERIWETHER: We object to the second and third paragraphs mentioned in the agreed statement, on the ground that the same are irrelevant and immaterial.

The objection was overruled by the court; to which ruling of the court the plaintiff at the time duly excepted.

Mr. MERIWETHER: We object to any testimony by the defendant under the answer, for the reason that under the pleadings and the admitted facts, the plaintiff is entitled to a judgment, and for the reason that the facts sought to be proved by the defendant are incompetent, irrelevant and immaterial to the issues of this case, and for the reason that the finding and assessment by the State board of equalization is final and not subject to attack in this suit. That

objection applies to all the testimony that may be offered on behalf of the Western Union Telegraph Company.

Said objection was overruled by the court; to which ruling of the court the plaintiff at the time duly excepted.

Defendant offered and read in evidence the deposition of ALEXANDER A. LESUEUR, in the words and figures following:

26 In the Circuit Court of the City of St. Louis.

THE STATE OF MISSOURI *ex Rel.* CHARLES F. WENNEKER, Collector of the City of St. Louis, in the State of Missouri, Plaintiff,

vs.

WESTERN UNION TELEGRAPH COMPANY, Defendant.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause that the deposition of Alexander A. Lesueur, a witness on behalf of the defendant, may be taken at the office of said Alexander A. Lesueur in the city of Kansas City, Missouri, on the 21st day of June, A. D. 1900, notice being hereby waived, and said deposition when taken, subject to the objections that may be made, may be read with the same force and effect in behalf of the defendant as if taken on full notice. And this deposition may be used as if taken originally in the case of State *ex rel.* Gottleib *vs.* Western Union Teleg'aph Co.

H. M. MERIWETHER,
Attorney for State ex Rel. Gottleib.
KARNES, NEW & KRAUTHOFF,
DICKSON & SMITH, *For Defendant.*

Appearances.

E. C. Slevin for plaintiff.
Elenelous Smith for defendant.

ALEXANDER A. LESUEUR, of lawful age, being produced, sworn and examined, on the part of the defendant, deposes and says:

Direct examination by Mr. ELENEIOUS SMITH:

Q. Captain, will you please state your full name?
A. Alexander A. Lesueur.
Q. And you now hold what office in the State of Missouri?
A. Secretary of state.
27 Q. How long have you held the office of secretary of state of the State of Missouri?
A. Eleven years the seventh of last January.
Q. As I understand it, Captain, there are really two State boards of equalization, are there not?
A. There are.
Q. One being constitutional and the other statutory?

A. One of the boards is a board to equalize the value of real and personal property.

Q. Throughout the State?

A. Throughout the State. And the other board is the original board of assessment to pass on railroad, telegraph and railroad-bridge properties.

Q. And the only properties that fall within the jurisdiction of the latter board are those you have mentioned?

A. Yes, sir.

Q. In the case of railroad, bridge and telegraph properties it is the duty of your board, is it not, to ascertain the character and quantity of property and fix its value, or, in other words, in that instance you assess the taxes?

A. Yes, sir; we make an original assessment of the valuation of the property.

Q. And you- associates on the board during the eleven years that you have held the office of secretary of state have been the governor, treasurer, auditor and attorney general, have they not?

A. Yes, sir.

Q. Captain, you are familiar in a general way with the returns that have been made from time to time annually, if I remember rightly, by the telegraph companies and particularly the Western Union, are you not?

A. In a general way, yes, sir.

Q. I mean you recollect the fact——

A. I recollect the character of the returns.

Q. When returns have been made?

A. Yes, sir.

Q. I will ask you if you were a member of the board and participated in the assessment of taxes upon the property of the Western Union Telegraph Company in Missouri for the year 1899 upon the return that was made in January, 1899, of the property in existence as of June 1st, 1898?

28 A. I participated in the assessment of the property of the Western Union Telegraph Company in the sessions of the board of 1899. I cannot state of my own knowledge when the annual return was prepared and submitted, but I have in my hand a certified copy of it which seems to show that it was subscribed and sworn to on the 16th day of January, 1899, and filed with the State auditor on the 17th day of January, 1899.

Q. Captain, I will hand you a paper, which for identification the notary will mark Exhibit "A," which purports to be a certified copy of the record of the State board of equalization with respect to the taxation of the Western Union Telegraph Company for 1899, and ask you to examine it and see whether or not you can recollect in a general way its contents.

The paper above referred to is here handed to the notary and marked Exhibit "A."

Exhibit "A" is here handed to the witness, who examines same.

A. I do.

Q. Captain, in this copy we find that a certain number of miles of poles and a certain number of miles of wire and a certain number of instruments are specifically assessed, and, of course, these classes of property identify themselves, but at the end there is this item, "All other property at $856,400.56." Are you able to tell us the character of the property that falls within that term, "all other property," and if so will you please do it?

A. My reply to that question would be that any individual view I might have regarding it would be of no particular value. The assessment would have to stand upon the language used by the board itself. This language was in the following words: "And considering the cost of construction and equipment of said Western Union Telegraph Company and the location thereof and its traffic and business and the market and par value of its stocks and bonds and the gross receipts and net earnings and franchises owned by said company and the value thereof, and having received
29 evidence concerning the value of the cost of construction of said telegraph line and the market value and par value of the stocks and bonds and of the gross receipts and net earning power and the franchises and value thereof, and having heard evidence upon and considered all other matter ascertainable by said board bearing upon the question of the value of said company (it should have been the value of the property, but I read it the way it is), which in the opinion of the board we assess in its findings, conclusions and judgment in arriving at actual cash value of the property of said telegraph company," etc. This would indicate therefore that a certain sum of assessment per mile was made on poles, a certain sum per mile was made on wire, a certain sum was made upon the instruments, and that the remainder, $856,400.56 was laid upon the other characters of property designated by the board in its order.

Q. Captain, is it, or is it not, a fact that the other characters of property, which you have read very fully as set forth in the official return, consisted of cost of construction and equipment, traffic and business, market and par value of stocks and bonds, gross receipts and net earnings and franchises, and that this last item is, in fact, intended to cover a taxation on what the board believed to be the proportion of franchises of the company applicable, if that is a proper term to use, to Missouri? Is that not the real fact as it was before the board?

A. I think my answer to the previous question covers this one. I can only reply to this interrogatory by repeating what I said then.

Q. Well, Captain, you do say that irrespective of your individual opinion, laying that aside, you would be bound, as of course you are, by the official record of your board, but this phrase "all other property" of course is in itself meaningless, I mean it is generic, and I would like to ask you the square question as to whether before the board it was not understood that the item intended to be covered by the $856,400.56 was not in fact franchises as applicable

to Missouri, and did you not take the position that it should have been so designated?

30 A. I can only reiterate what I have stated before, that the action of the board is concluded by its own declaration on that subject.

Q. Well, let me put it this way: The board in its official record states that franchises were considered. Now, am I right in saying that franchises constituted an element in the phrase "all other property"?

A. I think you have to judge that by the language of the board itself.

Q. Well, as a matter of fact, irrespective of the official language that was used, was not that an element, no matter how many other elements there might be, that was considered in making that valuation and fixing that assessment?

A. The board having chosen to set out in plain language the elements that were considered in making the assessment, no individual member of that board can add to or subtract from its own declaration in this regard.

Q. Well, I grant you that, but I don't wish to do either of those, but I simply ask you if, as a matter of fact and as declared by the board, if I read it rightly, franchises were not considered and embraced in that item?

A. The best evidence on that point is the record of the board itself.

Q. You have no objection to giving me your understanding of this record on this question?

A. I prefer not to give any individual views in the matter.

Q. Well, Captain, if franchises were considered and taxed, can you give us the proportion of these gross items that were figured up? We have no record to show that?

A. I can't state.

Q. Captain, can you mention as a matter of recollection any tangible property, by which I mean horses, or lands, or houses, or furniture, or anything of that kind that the board considered under the head of "all other property" and excluding, of course, wires, poles and instruments because they are specifically stated, but any tangible property that fell within the designation of "all other property"?

A. Well, I think that is answered by the record of the board.

31 Q. I am asking you now as a matter of your own recollection which, as a matter of fact, is not answered by this, because this don't refer on its face or otherwise to any corporeal property.

A. Well, I think it is answered by the record of the board, because they state what they assess. They state that they assessed certain tangible and visible property and certain other property which they define in their record.

Q. Well, that is true, but the tangible property that they do assess is, so far as I read the board's returns, specifically mentioned. Now, my question is, do you know of any tangible or corporeal property

other than the poles, wires and instruments that the board considered under this head of "all other property"?

A. I don't know that I do, but I wouldn't like to answer the question at this distance and with the multitude of items that were submitted to that board in a positive way.

Q. Well, it is true, is it not, as recited in the record of the board, that in fixing this valuation the traffic and business of the company, the market and par value of its stocks and bonds and gross receipts and net earnings and franchises were considered?

A. Those things that were mentioned in the record of the board as being considered were considered.

Q. And I am right in saying, am I, in connection with that record, that the figures that you reached here were the result of that consideration?

A. Unquestionably.

Q. Then I again ask, am I not right in picking out the one element of franchises and saying that that was considered, no matter what sort of franchise it was, that that was considered and entered into the assessment?

A. That is stated in the record.

Q. And it is a fact?

A. It is a fact that it was considered as one of the elements.

Q. And, Captain, you are not able, are you, to say how much of these figures, and I presume if franchises figured in this as-
32 sessment they would fall under the last item, "all other property," because it is neither poles, wires, nor instruments, are you able to say what proportion of the last item franchises would be, and if you cannot give a proportion, can you even in a general way state whether it was a large portion or a small portion of it?

A. I cannot answer that question, for the reason that the conclusion arrived at by each gentleman was held in his own breast.

Q. Well, but have you any objection to giving us your individual conclusion and letting us get those of the other members of the board and striking a fair average?

A. I prefer not to do that, for two reasons: First, that it is impracticable for me to give an answer that would have any value by reason of the fact that I cannot state how the other members arrived at their conclusion, and at this distance from the transaction it is impracticable for me to give an accurate estimate of how I formed my own conclusion. This in view of the fact that a great multitude of testimony in regard to railroads, railroad bridges and telegraph companies had at the time to be digested.

Q. Well, then, Captain, not being able to give either in figures or what proportion the amount at which franchises if this company were assessed, you do, however, know, as the record recites, that they were assessed at something and entered into this final figure that I have mentioned?

A. That was stated in the record.

Q. And that is a fact, is it not?

A. I assume that it is.

Q. I mean you, yourself, voted on some assessment of franchises did you not? I ask for your individual action?

A. I considered all those things that are stated in the record.

Q. Yes, sir; and then you did consider franchises?

A. That is one of the things stated in the record.

Q. Captain, I will ask you if you are familiar with the rule that has prevailed, if there has been one in our State, for many years, and particularly the eleven years that you have held the
33 office of secretary of state, with regard to the assessment of real and personal property throughout the State?

A. I think so.

Q. I mean its general assessment.

A. I think so.

Q. Captain, I will ask you if you are familiar with the rule existing in the State of Missouri with respect to the average proportion of actual value of real and personal property adopted by the assessing office as assessable value of such property for taxation purposes?

A. I am familiar with the practice.

Q. Well, that is what I want, practice or general custom.

A. The first question that you asked me was as to a rule and I can hardly answer that affirmatively, for the reason that there are several. The practice has grown up in Missouri for many years on the part of the assessors to return for assessment a portion only of the values of real and personal property. The practice of the State boards of equalization has been to equalize these various valuations as between counties. It might appear on the face of this proceeding that the State board was not literally complying with the law which requires assessments to be at real cash value. The boards have endeavored to remedy this defect, which they considered an evil and in the way of true equalization, but without success. One important reason for failure being its inability at the proper time to secure from the General Assembly such reduction of levy which accompanied with a doubling of the assessment would have procured only sufficient revenue for the economical administration of State government. It followed in a general way that properties which were subsequently assessed by the State board of equalization, composing an original assessing board, were in the main placed upon the same basis of valuation as had previously been the personal and real property of the State.

Q. Now, Captain, will you kindly state, if you can, what would be a fair average figure that would represent the proportion of actual value adopted throughout the State, well, say, dur-
34 ing the past five years, for the assessment of real and personal property?

A. Well, I would reply to that, that taking personal property and real property altogether, outside of the city of St. Louis, the average valuation was about forty per cent.

Q. In other words, that outside of the city of St. Louis the taxes during the past five years, for illustration, would be assessed on a

valuation that would be about forty per cent. of the actual value of real and personal property?

A. The State board of equalization has heard a great deal of evidence on this point and that is my conclusion drawn from that evidence.

Q. And what would the proportion be, Captain, stating as nearly as you can from your official knowledge, with respect to the city of St. Louis which you excluded in your preceding answer?

A. I would answer that question also in an explanatory way. Necessarily they state that they assess the property at a little higher valuation than collateral testimony shows it is assessed. I don't think that is a matter of bad faith or intentional misrepresentation, but simply grows out of the natural desire to approximate to the law as closely as possible. In the city of St. Louis the assessor and board of assessors make the statement that their valuation is about seventy per cent. of the actual cash value of property. From other testimony and investigations made by the State board of equalization in years past and personal inquiry, my own opinion is that property in the city of St. Louis is assessed at more nearly fifty per cent. of its actual cash value than the sum above stated.

Q. Then, Captain, from your knowledge as an officer of the State board of equalization and your personal information, am I right in saying that it is your best judgment that during the past five or perhaps more years property throughout the State in the various counties and cities, other than the city of St. Louis, real and personal, has been assessed at about forty per cent. of its actual cash value and in the city of St. Louis at about fifty per cent. of its actual cash value?

35 A. That is my opinion.

Cross-examination by Mr. E. C. SLEVIN:

Q. When you say that from the records of the board that franchises constituted an element of the phrase "all other property," what do you mean by franchises?

A. I cannot answer that question.

Q. Referring to the phrase "all other property," wasn't the valuation termed "all other property" ascertained by the following rule: Take the market value of the capital stock of the Western Union Telegraph Company and prorate to the State of Missouri such portion thereof as the mileage of poles and wires in Missouri bears to the total mileage of the company throughout the United States?

A. I cannot answer that question.

Redirect examination by Mr. ELENEIOUS SMITH:

Q. Captain what do you mean and what is your understanding of the term "franchises" as used in taxation by the State board of equalization.

A. I do not undertake to say what definition is placed on franchise valuation by the State board of equalization. My own understanding of the term is that in regard to quasi-public corporations

enjoying certain privileges granted by law there is a value in addition to that of the tangible property. The most feasible manner of arriving at an estimate of this valuation seems to be to ascertain the market value of the capitalization of the corporation, as a general rule, the market value of its shares of stocks and bonds, and from this to deduct the valuation of the tangible property, real and personal, which is otherwise assessed.

Q. And the difference between the valuation of the tangible property and the valuation of the entire property as above indicated is to be considered the franchise valuation?

A. Yes, sir.

Q. Captain, do you know whether the method you have mentioned was or was not adopted by the State board of equalizatiou in fixing any valuation of franchises in this Western Union assessment?

A. I cannot answer the question.

Q. Do you know whether or not Attorney General Crow presented a resolution for the assessment of the Western Union almost
36 exactly in accord with the explanation you have given us as to your idea of the way in which franchises should be valued and that the board in fixing the Western Union's assessment practically adopted Attorney General Crow's plan?

A. I prefer not to answer that question, because, in the first place, the record is the best evidence; and, in the second place, I wouldn't like to make a statement of that kind at this distance from the action taken without having the record before me.

Q. Well, Captain, I don't wish to suggest to you that such a resolution was made any part of the official record of the board, but assuming that your evidence as to what was the fact would be competent and would be considered by a court, I ask you if, as a matter of fact, that was not the method by which the figures contained in the assessment under the term of "all other property" were actually arrived at by the board?

A. I think I have declined to answer this question practically two or three times for reasons which I have explained above.

Recross-examination by Mr. E. C. SLEVIN:

Q. When you speak of the word "franchise" above in your direct examination as constituting an element in this assessment you do not mean the privilege to exist as granted by the State government or the General Government?

A. My view in regard to that is that the assessment is placed on an actual valuation, which partially grows out of the privilege to operate.

Q. I understood you to say a moment ago that your view was based on the capitalization of the company?

A. Yes, sir; I explained that, because, of course, it is very clear to everybody who is familiar with corporate operation and capitalization that capitalization does not always represent value. For instance, two corporations may be formed with a capitalization of one hundred thousand dollars each and do business for five years, at the

end of which time one may have lost all of its investment
37 and the other may have enhanced the value of its establishment by five hundred per cent. There could not be the same valuation in the one as the other. Sometimes capitalization represents valuation and sometimes it does not. This, as I have indicated above, must be determined, for assessments are to be made thereon by the best test, which is the market value of that which represents the capitalization of the corporation.

Q. Exactly. Therefore, in the two corporations of one hundred thousand dollars each which you have mentioned one would be represented at a valuation nil and the other one would be represented at a capitalization of five hundred thousand, because that is the actual cash value of its capital stock, is that not a fact?

A. That is my view.

Q. Therefore, the assessment is not made upon an intangible valuation or thing, but it is made upon an actual thing, the capital stock representing actual valuation?

A. I think so.

Q. That seems pretty plain?

A. I think so, and in using the word "tangible" property as contradistinguished from the franchise value, so called, I have simply followed the ordinary definition.

Q. Upon that explanation if the franchises of the Western Union Telegraph Company were considered in the valuation by the State board, it was not on franchises to be, but it was on the actual cash market value of the stocks that were considered by the State board?

A. That is your statement.

Q. It is a statement with an interrogation point at the end?

A. That is a question for the State board to answer as a board.

Signature waived.
(Notary's certificate.)

Mr. SMITH: The next deposition which we offer is the deposition of Edward C. Crow.

Said deposition, omitting the formal parts, is as follows:

EDWARD C. CROW, of lawful age, being produced, sworn and examined on behalf of the defendant, deposeth and saith:

Direct examination by ELENEIOUS SMITH, Esq.:

38 Q. Please state your full name.

A. Edward C. Crow.

Q. What position, if any, do you hold in the State of Missouri?

A. I am now and have been since January 11, 1897, attorney general of the State of Missouri.

Q. And you have been recently elected for a new term, beginning the coming January?

A. Yes, sir.

Q. General, I will ask you whether or not there are two State

boards of equalization of the State of Missouri, one being constitutional and the other statutory?

A. Well, it is all one board as we take it, but the constitution provides for a board of assessment of railroad property, I believe.

Q. Now, as I understand it, the State board of equalization of which you are, and during your term as attorney general have been a member, is the board which is the original board of assessment of the property of railroad, telegraph and railroad bridge companies?

A. Well, I have never divided up the boards that way, Mr. Smith, in my mind; I am not prepared to say that there is such a division.

Q. Am I correct then, in putting it this way, that the State board of equalization composed now and at all times during your term of office, of the governor, the attorney general, secretary of state, auditor and treasurer of the State, performs possibly, among other functions, those of original assessment or fixing valuations for the purposes of taxation of railroad, telegraph and bridge properties, and in addition to that, the equalizing of the values of real and personal property of a general character throughout the State?

A. I will answer that in this way: The State board of equalization, composed as stated in the above question, meets in February of each year and has laid before it the record of assessments as returned by the county assessors and county clerks of one hundred and fourteen counties in the State, and likewise the assessment by the assessing officials in the city of St. Louis, and upon the reception of this record, the State board of equalization proceeds to equalize
39 the value according to their judgment of the real and personal property of the different counties and the city of St. Louis, and in May of each year the State board of equalization meets and assesses and equalizes the valuation of steam railways, street railways, telegraph and bridge property throughout the State.

Q. General, I will ask you if in the year 1899 you remember in a general way that you were a member of the board of equalization by virtue of your office?

A. Yes, sir; I have already stated that.

Q. And do you remember that some time during the early part of 1899, there was presented to the board a return by the Western Union Telegraph Company of its property as of June 1st, 1898, I believe?

A. Well, without seeing the record of course I couldn't remember the date not the fact as to how a return was made, nor exactly what was in it, but in a general way I remember of course that the Western Union Telegraph Company had a return before our board, and I suppose it was timely made and in proper form, as it usually is.

Q. General, as we have not the original records of the State board of equalization before *is*, I will hand you what purports to be a copy from the official records of your board certified by State Auditor Seibert under his hand, and the auditor's seal of State, purporting to be a copy of the board's record with respect to the Western Union Telegraph Company's assessment made in 1899, with respect to property as of June 1st, 1898. I will ask you if you recognize it?

A. Well, I couldn't say that I could identify that. The language

of the resolution down to the figures in a general way seems familiar to me, but I have in mind that the figures were different from that, but that looks like the resolution that we had there. I could not identify it positively, but I expect it is the same thing. It is on that same general line; I guess it is.

Q. Now, General, in reading over the certified copy, which I will ask the notary to attach to your deposition and mark Exhibit A, I find in this resolution or record of your board, assuming it
40 to be as it purports to be, a true copy from the records, that certain property is specifically mentioned, so many miles of pole, so many miles of wire, and so many instruments, and then the generic term "all other property" at $856,400.56. Referring to the language of the resolution or record entry, whatever is the proper term, I see it sets forth that the board considered the facts set out in the returns and the statements of the company, all evidences of value and all matters bearing upon the question of the value of the property of the company, cost of construction and equipment, the location thereof, its traffic and business, the market and par value of its stocks and bonds, the gross receipts and net earnings and franchise owned by said company and the value thereof, and also evidence concerning the value of the cost of construction of the telegraph line, the market value and par value of the stocks and bonds, gross receipts and net earning power, the franchise and value thereof, in fixing the figures, which they did. Have you any independent recollection from the copy of the record which I have handed you, that these things were considered by the board in reaching these figures, assuming them to be correct?

A. I desire to say in answer to that question, that I suppose the record tells exactly what happened there and sets forth as accurately as I could set forth, what the board considered in fixing that value.

Q. Then, General, assuming, as I believe is the fact, that you did vote in favor of the entry that is here, the resolution or whatever it may be styled, your recollection is that the record properly sets forth the action on your part, as well as that of the other members?

A. Why, I don't know whether we voted to assess it at that figure or not. That purports to be a copy. I guess that copy is correct. We voted to increase that assessment; we did increase it very materially. We increased it over prior years; we did do that. But I will say this with reference to that record, that the record there of course only discloses the results of the findings of the board,
41 and it does not purport to set forth all the details, the facts and the evidence which we have before us, which facts and evidence of course you will find reported very fully in the official records of the board, and as far as the other members of the board are concerned, I can't say what they considered in voting, which they did vote for the resolution, and in basing that value. I can only speak for myself, and in speaking for myself, I did consider all those things in arriving at that value.

Q. There is an item which is not specific; of course we understand what poles and wires and instruments are, but there is one

item in the assessment which the board made for that year under the heading "All other property at $856,400.56," and I will ask you, of course as a matter of your own recollection, if you can tell us what from your standpoint was embraced in that item?

A. In reply to your question I would say that I could not now name what all was included in that item of "all other property," but it occurs to me that there was other tangible property included in the item "all other property," besides the enumerated items preceding this one in the schedule; for instance, desks and office furniture, repairs and the various classes of property that I presume the company then had and now has, subject to taxation in this State. I suppose also there was included in that what is known as the intangible value of property, to wit, the franchise value, but as to how much the franchise value or intangible property was valued at and how much the tangible property other than that specifically enumerated included under the head of "all other property" was valued at, I could not say.

Q. General, are you able in your mind, even in the roughest way, to fix the proportion of the one to the other; I mean on any basis at all that you think would be about right?

A. Not at this time. I would have to make the figures and look at the full record before me as it was then, and I don't know that even from that I could arrive at anything like an accurate conclusion.

42 Q. Let me ask it in this way. Are you able from your memory to say whether or not the intangible property, such as franchise, constitutes a considerable part of this $856,400.56 without binding you to the proportion or figures?

A. Without undertaking to be specific as to figures or as to proportional quantities, I would say that in my opinion the intangible value of the property of the Western Union Company in this State constituted a considerable element in the item last enumerated in the schedule of property under the designation of "all other property."

Q. General, I will hand you a copy of what purports to be a paper on file among those of the board of equalization for 1899, and ask you if you recognize it, and if so, whether or not it was prepared by you and fairly sets forth the methods of reaching among other items that last one in which I am interested, to wit, the item of "all other property"?

A. Well, in a general way I would say that I think I perhaps may have drawn that resolution and I am inclined to think that I did.

Q. And can you say whether or not this final item of $856,400.56, under the head of "all other property," was reached in the manner indicated in the resolution, and as practically recited on the record?

A. Well, I would say in answer to that, that it sets forth here in the concluding clause of this resolution that the board "having given the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company,

through its officers and agents, and having carefully considered the facts set out in the returns"—of course that takes in all your property that you set out in the return; what that is, I don't know, but there is a great long schedule of it—"and the statements of said company," that includes the records made by Mr. Cook which are a part of the records of the board taken down in shorthand, and "all evidences of value and all matters bearing upon the question of value of the property of said company," which would include
43 the knowledge of the board with reference to the value of all the tangible and all the intangible property and the other question, "all other property"—"and considering the cost of construction and equipment of said Western Union Telegraph Company," and the place where the lines when constructed were erected, the volume of business, the receipts, the value of the stocks and bonds and earnings after paying fixed charges and the franchises owned by the company and the value of said franchises, and I am of the opinion that this general statement covers pretty fairly my idea of what went to make up the different items that constituted the aggregate of $1,827,727.46.

I hand this paper to the notary, being the last paper referred to by General Crow, and ask the notary to mark it Exhibit "B" to the examination of this witness.

Paper withdrawn by defendant.

Cross-examination by E. C. SLEVIN, Esq.:

Q. What do you understand by the meaning of the word "franchise" as used by you in your direct examination?

A. Well, the sense in which I use it might not be agreed to by lawyers or laymen without qualification, but I used it in the sense of representing the class of property owned by the Western Union Telegraph Company and controlled by it, such as the privileges and rights to erect and maintain their poles and wires, to carry on their traffic in the different portions of the State of Missouri in connection with their rights to so erect their poles and wires and carry on their traffic wherever else their lines extended in this country and other countries, representing a unity of use in the entire corporate property, making the same thereby much more valuable than it otherwise would be for use separately and independently in each Territory or country.

Q. And therefore the privilege to be or to exist does not enter into your idea at all in the matter of values as you have explained
44 by way of franchise?

A. Oh, no. As I understand it, the Western Union corporation acquires their right to exist as a corporation from an act of the Federal Congress; they have this, however, which I did not consider, and that is the right to use the posts of the Federal Government. I did not consider that as an element in fixing the franchise value of property in the use of my term of the word "franchise," although it might properly be considered, as the courts have held in

a Massachusetts case, but I did not have that in mind when I used the word "franchise."

Mr. SMITH: We offer a certified copy from the record of the State board of equalization containing the resolution and entry under which the assessment complained of was made:

Said copy is as follows:

STATE OF MISSOURI,
Office of State Auditor.

Be it remembered that heretofore, to wit, on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the State board of equalization, viz:

The State board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidences of value, and all matters bearing upon the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the locaton thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and of the gross receipts and net earning
45 power, and the franchise and the value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the State board of equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the State board of equalization that the assessed value thereof be distributed upon the said classes of property as follows:

6,075.98 miles of poles at $71.50 per mile.....	$434,432.57
23,767.34 miles of wire at $22.02 per mile.....	523,356.82
2,375 instruments at $5.70 each	13,537.50
All other property at.....	856,400.56
Total.....	$1,827,727.45

STATE OF MISSOURI,
Office of State Auditor.

I, James M. Seibert, State auditor of the State of Missouri, do hereby certify that the above and foregoing is a true, full and complete copy of the order of the State board of equalization, respecting

the assessment of the property of the Western Union Telegraph Company for taxes of 1899, as fully as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State auditor. Done at office in the city of Jefferson, this 8th day of June, 1900.

[SEAL.]

J. M. SEIBERT,
State Auditor.

Mr. SMITH: I offer a certified copy of the return under oath made by T. P. Cook, superintendent of defendant company, which purports to have been sworn to on the 16th day of January, 1899, and filed on the 17th day of January, and being certified by State Auditor Seibert. Said return is as follows:

46 *Property Owned by the Western Union Telegraph Company on June 1st, 1898, Returned for Taxation of the Year of 1899, in the State of Missouri.*

County.	Miles of poles.	Valuation at $50.00 per mile.	Miles of wire.	Valuation at $10.00 per mile, including instruments and batteries.	Total valuation returned.	Taxes, 1898.
Adair	65.94	$3,296 00	130.82	$1,308.20	$4,605.20	$142.42
Andrew	41.34	2,067.00	95.41	954.10	3,021.10	107.18
Atchison	53.09	2,654.50	151.94	1,519.40	4,173.90	106.61
Audrain	78.24	3,912.00	622.79	6,227.90	10,139.90	304.65
Barry	45.10	2,255.00	100.50	1,005.00	3,260.00	113.72
Barton	86.76	4,338.00	244.71	2,447.10	6,785.10	203.27
Bates	102.34	5,117.00	267.71	2,677.10	7,794.10	229.61
Benton	28.95	1,447.50	28.95	289.50	1,737.00	61.44
Bollinger	33.16	1,658.00	52.97	529.70	2,187.70	89.38
Boone	82.42	4,121.00	331.22	3,312.20	7,433.20	213.61
Buchanan	141.53	7,076.50	548.77	5,487.70	12,564.20	431.98
Butler	51.04	2,552.00	233.56	2,335.60	4,887.60	198.69
Caldwell	48.38	2,419.00	145.14	1,451.40	3,870.40	125.44
Callaway	77.29	3,864.50	184.21	1,842.10	5,706.60	226.02
Camden	4.00	200.00	16.00	160.00	360.00	10.00
Cape Girardeau	77.15	3,857.50	139.40	1,394.00	5,251.50	118.77
Carroll	67.44	3,372.00	559.72	5,597.20	8,969.20	318 23
Carter	44.82	2,241.00	44.82	448.20	2,689.20	67.58
Cass	173.40	8,652.00	536.50	5,365.00	14,017.00	674.29
Chariton	81.91	4,095.50	536.05	5,360.50	9,456.00	306 86
Christian	33.48	1,674.00	74.48	744.80	2,418.80	76.14
Clark	59.19	2,959.50	182.55	1,825.50	4,785.00	189.84
Clay	80.06	4,003.00	440.02	4,400 20	8,403.20	275.54
Clinton	88.52	4,426.00	215.08	2.150.08	6,576.80	201.54
Cole	47.37	2,368.50	291.37	2,913.70	5,282.20	202.18
Cooper	72.64	3,632.00	265.36	2,653.60	6,285.60	179.08
Crawford	53.55	2,677.50	133.20	1,332.00	4,009.50	108.13
Dade	36.15	1,807.50	112.53	1,125.30	2,932.80	124.96
Daviess	103.16	5,158.00	323.58	3,235.80	8,393.80	223.94
De Kalb	46.71	2,335 50	130.50	1,305.00	3,640.50	121.28
Dent	13.00	650.00	13.00	130.00	780.00	21.11
Dunklin	26.94	1,347.00	54.12	541.20	1,888.20	47.87
Franklin	98.21	4,910.50	587.79	5,877.90	10,788.40	484.52

Property Owned by the Western Union Telegraph Company, etc.—Continued.

County.	Miles of poles.	Valuation at $50.00 per mile.	Miles of wire.	Valuation at $10.00 per mile, including instruments and batteries.	Total valuation returned.	Taxes, 1898.
Gasconade	16.28	$814 00	179.08	$1,790.80	$2,604.80	$90.77
Gentry	68.64	3,432.00	118.06	1,180.60	4,612.60	117.51
Greene	108.76	5,438.00	362.43	3,624.30	9,062.30	323.09
Grundy	53.82	2,691.00	215.42	2,154.20	4,845.20	175.44
Henry	96.34	4,817.00	231.37	2,313.70	7,130.70	233.21
Holt	68.89	3,444.50	255.68	2,556.80	6,001.30	169.01
Howard	49.09	2,454 50	243.41	2,434.10	4,888.60	168.49
Howell	57.07	2,853 50	174.19	1,741.90	4,595.40	175.05
Iron	33.69	1,684.50	202.14	2,021.40	3,705.90	126.88
Jackson	168.47	8,423.50	1,052.95	10,529.50	18,953.00	698.27
Jasper	123.14	6,157.00	340.60	3,406.00	9,563.00	308.06
Jefferson	30.93	1,546.50	261.16	2,611.60	4,158.10	169.76
Johnson	86.84	4,342.00	475.70	4,757.00	9,099.00	368.09
Knox	40.27	2,013.50	113.23	1,132.30	3,145.80	170.71
Laclede	38.05	1,902.50	152.50	1,522.00	3,424.50	115.94
Lafayette	106.55	5,327.50	386.63	3,866.30	9,193.80	304.91
Lawrence	51.44	2,572.00	140.61	1,406.10	3,978.10	129.92
Lewis	45.45	2,272.50	67.01	670.10	2,942.60	93.75
Lincoln	53.92	2,696 00	74.80	748.00	3,444.00	118.54
Linn	40.95	2,047.50	147.07	1,470.70	3,518.20	108.78
Livingston	90.32	4,516.00	261.94	2,619.40	7,135.40	233.17
McDonald	20.96	1,048.00	62.88	628.80	1,676.80	49.38
Macon	88.06	4,403.00	288.02	2,880.20	7,283.20	229.49
Madison	26.10	1,305.00	49.70	497.00	1,802.00	47.74
Marion	71.83	3,591.50	250.74	2,507.40	6,098.90	175.10
Mercer	25.02	1,251.00	125.10	1,251.00	2,502.00	90.38
47 Miller	19.27	963.50	19.27	192.70	1,156.20	27.73
Mississippi	59.81	2,990.50	144 99	1,449.90	4,440.40	147.05
Moniteau	35.58	1,779.00	277.58	2,775.80	4,554.80	172.33
Monroe	45.68	2,284.00	217.29	2,172.90	4,456.90	128.70
Montgomery	39.66	1,983.00	320.04	3,200.40	5,183 40	194.28
Morgan	19.48	974.00	92.48	924.80	1,898.80	83.13
New Madrid	43.81	2,190.50	153.23	1,532 30	3,722.80	138.05
Newton	66.18	3,309.00	162.76	1,627.60	4,936.60	142.15
Nodaway	116.05	5,802.50	220.56	2,205.60	8,008.10	240.23
Oregon	14.63	731.50	58.52	585.20	1,316.70	48.74
Osage	23.83	1,191.50	262.13	2,621.30	3,812.80	138.33
Pettis	90.50	4,525.00	490.94	4,909.40	9,434.40	372.93
Phelps	32.75	1,637.50	131.00	1,310.00	2,947.50	89.03
Pike	88.37	4,418.50	305.05	3,050.50	7,469.00	300.37
Platte	73.40	3,670.00	271.31	2,713.10	6,383.10	235.77
Polk	47.48	2,374.00	106.10	1,061.00	3,435.00	68.31
Pulaski	32.75	1,637.50	131.00	1,310.00	2,947.50	85.06
Putnam	24.71	1,235.50	64.13	641.30	1,876 80	63.68
Ralls	63.85	3,192.50	172.40	1,724.00	4,916.50	198.48
Randolph	80.34	4,017.00	588.43	5,884.30	9,901.30	324.80
Ray	93.78	4,689.00	469.89	4,698.90	9,387.90	282.81
Ripley	15.93	796 50	31.86	318.60	1,115.10	27.32
St. Charles	88.15	4,407.50	528.73	5,287.30	9,694.80	263.21
St. Clair	48.08	2,404.00	121.38	1,213.80	3,617.80	78.65
St. François	35.54	1,777.00	137.26	1,372.60	3,149.60	106.21
St. Louis City	76.53	3,826.50	1,050.97	10,509.70	14,336.20	1,153.59
St. Louis	150.60	7,530.00	921.41	9,214.10	16,744.10	520.70

Property Owned by the Western Union Telegraph Company, etc.—Continued.

County.	Miles of poles.	Valuation at $50.00 per mile.	Miles of wire.	Valuation at $10.00 per mile, including instruments and batteries.	Total valuation returned.	Taxes, 1898.
Saline	83.23	$4,161.50	332.09	$3,320.90	$7,482.40	$244.04
Schuyler	39.59	1,979.50	85.18	851.80	2,831.30	110.89
Scotland	32.82	1,641.00	96.36	963.60	2,604.60	103.78
Scott	34.66	1,733.00	57.03	570.30	2,303.30	66 65
Shannon	27.30	1,365.00	27.30	273.00	1,638.00	44.78
Shelby	24.74	1,237.00	74.22	742.20	1,979.20	59.20
Stoddard	88.93	4,446.50	88.93	889.30	5,335.80	160.47
Sullivan	52.11	2,605.50	88.91	889.10	3,494.60	105.79
Texas	17.69	884.50	70.76	707.60	1,592.10	60.12
Vernon	130.88	6,544.00	373.04	3,730.40	10,274.40	306.41
Warren	46.87	2,343.50	296.44	2,964.40	5,307.90	155.96
Wayne	65.94	3,297.00	227.64	2,276.40	5,573.40	181.54
Washington	24.28	1,214.00	166.24	1,662.40	2,876.40	105.62
Webster	48.87	2,443.50	195.48	1,954.80	4,398.30	124 48
Wright	27.53	1,376.50	110.12	1,101.20	2,477.70	90.33

6,075.98 miles of poles at $50.00 per mile $303,799.00
23,767.34 miles of wire at $10 00 per mile 237,673.40

Total $541,472.40

48 THE STATE OF MISSOURI, }
City of St. Louis. }

I, T. P. Cook, superintendent, do solemnly swear that the foregoing inventory rendered by me contains a full, true and complete list of all taxable property owned or held by me for the Western Union Telegraph Company in the several counties of Missouri, and all personal property in the said counties, subject to taxation by the laws of Missouri on the first (1st) day of June, eighteen hundred and ninety-eight (1898), and that I have made true answers to all questions propounded to me touching the same, so help me God.

(Signed) T. P. COOK,
Superintendent.

Subscribed and sworn to before me, this 16th day of January, 1899. (Term ends June 30th, 1901.)

C. D. GREEN, JR.,
[SEAL.] *Notary Public.*

Endorsed: Filed January 17th, 1899. J. M. Seibert, State auditor.

A true copy.
Attest:
(Signed) J. M. SEIBERT,
[SEAL.] *State Auditor.*

The defendant offered and read in evidence the deposition of Theodore P. Cook, in the words and figures following:

In the Circuit Court of Jackson County, Missouri.

STATE *ex Rel.* CHRIS GOTTLEIB, Collector of the Revenue, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant.

Deposition of Theodore P. Cook, a witness produced, sworn, and examined on the eighth day of January, in the year of our
49 Lord 1901, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of Dickson & Smith, No. 1105 Union Trust building, in the city of St. Louis and State of Missouri, before me, Margaret Nealon, a notary public within and for the city of St. Louis, in the State of Missouri, in a certain case now pending in the circuit court of the county of Jackson, in the State of Missouri, between The State *ex rel.* Chris Gottleib, collector of the revenue, plaintiff, and The Western Union Telegraph Company, defendant, on the part of the defendant.

Appearances: Eugene C. Slevin for plaintiff, and Eleneious Smith on behalf of the defendant.

THEODORE P. COOK, of lawful age, being produced, sworn and examined on the part of the defendant, deposeth and saith:

Q. Now, Mr. Cook, please state your full name, age, residence and occupation.

A. My name is Theodore P. Cook; age, 55 years; residence, St. Louis, Missouri; superintendent of Western Union Telegraph Company.

Q. What territory, Mr. Cook, is under your jurisdiction as the company's superintendent at St. Louis?

A. Well, there are about six States, including the whole of Missouri.

Q. How long have you been associated with the Western Union Telegraph Company in any capacity?

A. Well, about twenty-eight years.

Q. Continuously?

A. Yes, sir.

Q. What kinds of positions have you held during your twenty-eight years of service?

A. I have been manager of offices and assistant superintendent of telegraph, and superintendent of telegraph.

Q. How long have you been superintendent in charge of the St. Louis office?

A. Since April 1, 1897.

Q. You held the position continuously since that time?

A. Yes, sir.

Q. I will ask you, Mr. Cook, whether or not you have any
50 familiarity with the construction of telegraph lines and particularly the Western Union system, in addition to familiarity with the operation, and generally of the business of the company?

A. Yes, sir. I have had a good deal of experience in construction of all kinds.

Q. Have you also had experience in operation, by which I mean the conduct of the company's business?

A. Yes, sir.

Q. How long have you known the Western Union system as it existed in Missouri and exists today?

A. About twenty-five years.

Q. In what way have you acquired that familiarity, and especially during the period prior to April, 1897?

A. Well, as assistant superintendent I traveled over the country a great deal, inspected offices and lines and looked after various matters.

Q. Did you make the return for the company for taxation purposes as required by the laws of Missouri in January, 1899, for the year 1899, pertaining to the property of the company in the State as of June 1, 1898?

A. I did.

Q. You are familiar with that return, a certified copy of which I show you, are you not? (Copy handed witness.)

A. Certainly.

Q. Mr. Cook, I observe that that return purports to give a valuation as fixed by you on behalf of the company in the various counties and certain cities of the State of Missouri, of the poles of the company by miles, the wire of the company by miles, under the latter head there being the statement that it includes instruments and batteries. Am I right in my interpretation of the returns?

A. Yes, sir.

Q. Now, first, although that return is sworn to, I will ask you whether that return faithfully sets forth, both in its detail and in its aggregate, the miles of wire and poles of the company in the State of Missouri on June 1, 1898?

A. The aggregate of miles of poles and wires is absolutely correct.

51 Q. I will ask you, Mr. Cook, whether the company on June 1, 1898, owned any real estate whatever in the State of Missouri?

A. No, sir.

Q. I will ask you whether it owned any property in the State of Missouri, other than poles, wires and the accompanying fixtures and batteries and instruments?

By Mr. E. C. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. Yes; it had.

Q. Have you, Mr. Cook, at my instance, made up a list of the

property owned by the Western Union on June 1, 1898, in Missouri, other than poles, wires, their fastenings and batteries and instruments?

A. Yes, I have.

Q. Will you please state of what that property consisted, if you can?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. Three horses, three wagons, forty desks, 883 chairs, 28 counters and partitions, 33 cupboards or closets, 23 stoves, 153 tables and certain dynamos in St. Louis and Kansas City, which really come under the head of batteries.

Q. Well, anything more?

A. No, sir; that is all.

Q. Where, if you know, Mr. Cook, was the greater portion of this property that you have just mentioned, located?

A. The greater portion in St. Louis and Kansas City and St. Joseph.

Q. I will ask you, first, if you know of any property whatever of any kind or character, owned by the Western Union in Missouri on June 1, 1898, other than the poles, wires, etc., set forth in the return to the board of equalization and the property that you have just mentioned?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

52 A. None that I know of.

Q. I will ask you if you know whether or not the property you have just described was taxed in St. Louis, Kansas City or St. Joe? I mean for the year 1899.

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. It was.

Q. And also as to whether such taxes were or were not paid?

A. They were paid.

Q. Have you the tax bills covering this property that we have been mentioning for the three cities mentioned as paid?

A. I have.

Q. Please produce them.

The three tax bills last above referred to were here handed to Mr. Smith.

By Mr. SLEVIN:

Q. For the year 1899?

A. Yes, sir.

By Mr. SMITH (resuming examination):

Q. Mr. Cook, I will ask you whether or not you are familiar with the character of property that is covered by the tax bills which you

have just handed me, and which I will ask to be marked for identification, Exhibit "A," "B," and "C," and attached to your deposition, and I will exclude from that question the item in the St. Joseph tax bill of merchants' tax.

The documents last above referred to are attached as exhibits to this deposition and marked respectively Exhibits "A," "B," and "C."

A. I am familiar with it.

Q. Well, will you state, if you please, the character of property covered by these three receipts, omitting the merchants' item under the St. Joseph bill, Exhibit "C"?

A. They cover furniture, desks, horses and wagons, chairs and things of that kind.

Q. Is it limited to property such as that you have hereto-
53 fore described?

A. Yes, sir.

Q. Do you know whether there is embraced in those three bills, or any of them, omitting from consideration the item, "merchants," in the St. Joe bills, any poles, wires or property of that character?

A. No, sir; that is given in the general mileage of the State.

Q. Are you able to give us approximately, and I will ask you to make an outside figure, one that you can swear is large enough, of the value of the personal property owned by the company, other than poles, wires and batteries, and of the kinds specifically described by you on June 1, 1898, in the State of Missouri, outside of the cities of St. Louis, Kansas City and St. Joseph?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. Well, I would estimate $1,000.00 would fully cover it.

Q. Please state what in your judgment, then, would be a fair aggregate valuation for what I may term "outside property" of the character you have described in the entire State of Missouri on June 1, 1898.

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. I should say that $5,000.00 would cover it.

Q. Mr. Cook, you are familiar, and I suppose have been since at least your assumption of the position of superintendent, with the company's matters in Missouri, and the property that they own, and the rights that they have, contract, ordinance and otherwise?

A. Yes, sir; I know.

Q. I will ask you if, to your knowledge or information, the company possess any rights by way of ordinance, gift or any franchise that you are at all familiar with, coming from the State of Missouri, or any of its subdivisions, counties or municipalities, and I will ask you this particularly with reference to June 1, 1898, but ask that your answer not only cover that time, but the time prior and
54 since?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. Well, we have no record of any ordinance or concession that I call to mind, except a small one of about a year ago, which was a permit from the city of Columbia to put poles on certain streets in a certain locality.

Q. And that, as I understand you, was an ordinance passed by the authorities of the city of Columbia?

A. Yes; to set poles in a certain locality in that city.

Q. Giving permission to set poles in that city, but in a certain locality?

A. Yes, sir.

Q. Are you familiar with any other rights or franchises of any kind or character that you can call to our attention, given either by the State or any of the municipalities?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the same grounds—*i. e.*, irrelevancy, and because it is immaterial.

A. I do not.

Q. I will ask you to describe briefly the extent of the business of the Western Union Telegraph Company, by which I mean the parts of this country or other countries that it operates in; in other words, very briefly describe the extent of the operations of the Western Union Company.

A. Well, they operate in all sections of the country I have traveled through—that is, so far as my knowledge goes—and all over the United States.

Q. Do you know whether their lines reach beyond the United States?

A. Well, they connect with lines with different countries—Mexico, Canada, and the ocean cables.

Q. Do you know whether the lines extend, for illustration, from Illinois, across the Mississippi river into and through Missouri, and across the Missouri, and into adjoining States?

55 A. Yes, sir; in quite a number of places, St. Louis and Kansas City.

Q. Has your company, for instance, a through line that would run from New York, via St. Louis and Kansas City, to Omaha, for illustration?

A. Yes, sir; and San Francisco, and in various directions; also to Texas.

Q. I will ask you whether on June 1, 1898, you were familiar with the condition first of the company's system in Missouri, by which I mean the extent of its poles and wires, their condition, including batteries and the company's equipment?

A. Yes, sir; I was.

Q. I will ask you whether or not, Mr. Cook, you were, at that time or now, sufficiently familiar with the cost of the material and expense of labor that would go into the construction of such a sys-

tem as the company had in Missouri on June 1, 1898, as will enable you to give us those figures, both in the aggregate and in detail?

A. Yes, sir; I was thoroughly familiar with the cost of material and construction.

Q. In the first place, will you please state, necessarily in a general way, the condition of the company's system in Missouri on June 1, 1898?

A. In my judgment—well, the deterioration you mean?

Q. I mean its general condition.

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is immaterial and irrelevant.

A. I think at that time the deterioration for new material would be, at least, 65 per cent.

Q. Now, I suppose, that the reconstruction and repair and replacement of poles and wires and batteries is going on continuously in Missouri and elsewhere, is it not?

A. Yes, sir.

Q. Is it a fact in 1898, the poles, for instance, would be in various stages of decay, some new and some old?

A. Yes, sir; some were old, very old.

56 Q. What is the average life of a telegraph pole in the outlying districts, for instance?

A. From eighteen to twenty years.

Q. Do you make that statement as the result of those twenty-five years' of observation that you speak of?

A. Yes, sir.

Q. Mr. Cook, I will ask you whether or not you have made up a statement showing in detail the cost of material and labor for the erection of one mile of poles and one mile of wire in the State of Missouri on June 1, 1898, and also a statement as to the cost at that time of the company's battery and instrument system in Missouri.

A. I have.

Q. Well, will you give us the cost of constructing a mile of poles, and by poles I mean new poles, of the average character of those that existed in Missouri on June 1, 1898?

A. Well, new poles of the standard size and quality used at that time, including the labor of erecting, complete, cost $61.90 per mile.

Q. Have you made up a statement showing the cost of one mile of wire with its fastenings and the stringing of the same in Missouri at that time.

A. Total cost at that time, $24.41 per mile.

Q. Now have you multiplied those figures respectively by the actual pole and wire mileage in the State of Missouri on June 1, 1898, so as to give aggregate results?

A. On the date the returns were made we had 6,076 miles of poles, which new, at $61.90 per mile, would have cost $376,104.40; on the same date we had 23,736.34 miles of wire, if new at $24.41 per mile; total $580,159.76.

Q. Now have you also made up, Mr. Cook, the figures that would

show the cost at an ordinary market price on June 1, 1898, of the battery and instrument system of the company in Missouri?

A. I have, and furnish a list of the total number of all kinds of instruments and the cost.

Q. What do they aggregate?

A. $28,093.73.

Q. Now what is the grand total, if you have made it, of the
57 three classes of items?

A. $984,357.89.

Q. Will you please attach the total statement that you have made up, and from which you have just testified, to your deposition, in order that the notary may mark it "Exhibit D"?

A. Yes, sir.

The statement last above referred to is attached to this deposition as an exhibit thereto, and marked "Exhibit D."

Q. Now, Mr. Cook, am I right in my understanding that the grand aggregate you have just given — you testify would, from your knowledge, produce a new plant of the character and size and extent that existed in Missouri on June 1, 1898, barring the outside personal property, such as tables, chairs, horses and wagons, etc.?

A. Yes, sir.

Q. And to that aggregate, how much, if you please, should be added in order to make up, if you can give it to us, an absolutely new plant on June 1, 1898, that would cover all property of every kind and character of the company in Missouri on June 1, 1898?

By Mr. SLEVIN: Plaintiff's counsel objects on the ground that the question is irrelevant and immaterial.

A. I don't know that I could give you that; I think $10,000.00 would replace them new.

Q. So that $10,000.00 added to the $984,357.89 would, if my understanding of your testimony is correct, in your judgment, have made an entirely new plant in Missouri?

A. Of everything.

Q. Have you picked out, Mr. Cook, some sample invoices from the files of the company, showing the cost of wire, poles and instruments about the period that we have been considering, June 1, 1898?

A. Here are the original invoices; yes, sir. I have the original invoices.

Q. I will ask you whether or not those that you have selected fairly represent the prices paid during the year 1898, or whether you have selected those of the lowest figures?

A. I have made this of the largest, in figuring out the
58 mileage of poles. I have taken $1.10 each, although we have some during the same year at $1.05.

Q. How about instruments?

A. The instruments are a little larger than the invoice prices here; they vary from time to time.

Q. How about wire?

A. That is at cost. I took the higher, 4¼ cents a pound, although some was bought at 4⅛ cents per pound; the instruments are based a little higher than some invoice prices here, the poles at $1.10, although some are invoiced at $1.05 and the cross-arms are figured at one-fourth their price.

The invoices last above referred to are attached to this deposition, as exhibits thereto, and are marked for identification "Exhibits E, F, G, H, I, J, K, L, M, N, O, P, Q and R."

By Mr. SLEVIN: Plaintiff's counsel objects to the introduction of the evidence on the ground that it is immaterial and irrelevant to the issues in this case.

Cross-examination by Mr. E. C. SLEVIN, attorney for the plaintiff:

Q. Mr. Cook, your company made the returns to the State board of equalization of property owned by the company in Missouri for taxation for the year 1899?

A. Yes, sir.

Q. How does that return made by the company at that time compare with "Exhibit D"?

A. Well, it is less.

Q. That is to say that "Exhibit D" is less than the amount returned to the State board?

By Mr. SMITH: It is just the reverse.

By Mr. SLEVIN:

Q. That is to say, the return to the State board is less than the total of "Exhibit D"?

A. (By witness:) Yes.

Q. Did your company make a return to the city of St. Louis of property for taxation by the city?

A. Yes, sir; assessed by the local board.

Q. That is exemplified in "Exhibit A" to your deposition?

A. Yes, sir.

59 Q. The property taxed in "Exhibit A" is not also taxed in "Exhibit D"?

A. No.

By Mr. SMITH: I will say that there is no contention here of double taxation.

A. (By witness:) No.

Q. How do you account for the discrepancy between the return made by the company to the State board, and your computation of the property as shown in "Exhibit D" to your deposition?

A. One is absolutely new material, and the other as it was at the time rendered; the deterioration.

Q. If then, you add the outside figure placed by you upon property of the character of tables, chairs, horses and wagons, etc., and of a character other than that returned by you to the State board of

equalization, you have given what in your judgment would be the cost price new of the entire plant of the company in the State of Missouri on June 1, 1898?

A. Yes, sir.

Q. Your return to the State board took into consideration the deterioration of this material by use?

A. Yes, sir.

Q. Can you state whether the company has at any time attempted to take any appeal from the action of the State board of equalization upon the assessment made by it for the year 1898?

A. No, sir; there was no appeal, and no other legal proceedings other than the defences that are now being made. Mr. Frankel, assistant superintendent of our company at St. Louis, and Mr. Smith, our attorney, appeared before the board, and what they did is shown in a certified copy of the proceedings that I hand the notary herewith, to be attached to my deposition as "Exhibit S."

The document last above referred to is attached as an exhibit to this deposition and marked "Exhibit S."

Mr. SLEVIN: Plaintiff objects to the introduction of the certified copy in evidence on the grounds that it is immaterial and irrelevant and irresponsive to the question asked.

60 Mr. SMITH: That is all.

Mr. SMITH: Do you wish*ed* these signed, or will you waive signature?

Mr. SLEVIN: We will waive signature.

Signature waived.

(Notary's certificate.)

Mr. SMITH: Without taking up time to read the exhibits attached to this deposition, I will offer them in their entirety.

EXHIBIT A.

State, School, and City Taxes for 1899.

City Book 12, bill 74.

Received of Western Union Telegraph Co.—residence: R. H. Bohle, mgr., 412 Pine St.—sixty-nine $\frac{81}{100}$ dollars, being the amount of State, school, and city taxes for the year 1899, in St. Louis city, on real estate as below detailed and on personal property.

City block.	Street or avenue.	Feet front.	Feet deep.	Addition.	Block.	Lot.	North.	East.	South.	West.	Limits.

Specified designation of taxes valuation.	Aggregate of assessed value.	Amount of taxes. Doll's.	Cts.	Mills.
State.	*Rev.*	*5*	*37*	
	Int.	*3*	*58*	
Revenue—0.15 cents on $100				
Interest—0.10 cents on $100	35.80			
Total—0.25 cents on $100				
Public school.				
General—0.40 cents on $100		14	32	
Total—0.40 cents on $100				
City.				
Municipal purposes—0.98 cents on $100				
Interest on valid indebtedness—0.30 cents on $100				
Public school library—0.02 cents on $100				
Total $1.30 on $100	Total.	46	54	
		69	81	

Approved:
T. P. COOK, *Supt.*

Personal property 35.80

35.80

Dec. 27, 1899.

CHAS. F. WENNEKER, *Collector*,
By L. ALT, *Deputy*.

61 EXHIBIT B.

No. 3407.

This receipt is not valid until countersigned by the city auditor.

KANSAS CITY, MO.,
OFFICE OF CITY TREASURER, 5, 23, '99.

To Western Union Tel. Co.:

Address: 7 and Main.

For taxes levied by said city for the year 1899 on personal property.

Form 18.

Voucher No. 102.

	Value. Doll's.	Taxes. Doll's. Cents.
	1,000	12.00
Rebate	.....	.72
Penalty	.....	.....
Penalty	.....	.....
		11.28

Received payment.

J. SCOTT HARRISON, JR.,
City Treasurer,
By SURALL, *Deputy.*

(Countersigned:)
AMOS R. CECIL,
City Auditor.

Across the face is the following: "Approved. T. P. Cook, sup't," and also "Paid, 1899. J. Scott Harrison, Jr., city treasurer."

EXHIBIT C.

Tax Levy, 1899.

General fund	$1.00	
Interest fund	.30	817
Sinking fund	.25	
On each $1.00 valuation	1.55	Original

62 This receipt must be signed by the auditor.

CITY TREASURER'S OFFICE,
ST. JOSEPH, MO., *May* 16, 1899.

Received from Western Union Telegraph Company the sum of 109.13 dollars in full of the taxes levied upon the following property by the city of St. Joseph for the year 1899, to wit:

Description.	Lot.	Bl'k.	Addition.	Valuation.	Tax. Doll's. Cts.	Total. Doll's. Cts.
Personal.....	...	...	45	$50	.78	
Merchants'.....	...	...	17	7,440	115.32	
						116.10

Form 18.
Voucher No. 101.

Approved.

T. P. COOK, *Sup't.*

Discount, 6 per cent..... 6.97

Total tax..... 109.13

Read notice on opposite side.

RICE D. GILKEY, *Treasurer.*
LINCOLN, *Deputy.*

T. R. ASHBROOK, *Auditor.*

EXHIBIT D.

Cost per Mile of New Poles Erected in 1-98, *Including Labor.*

30 poles, at $1.10	$33.00
Labor, erecting poles.....	21.40
Freight on poles (30) at 25c.....	7.50
Total, one mile of poles.....	$61.90

Cost per Mile of a New Eight-guage Iron Wire Erected in 1898 *on Poles, Including All Fixtures and Labor.*

1 mile No. 8 galvanized wire, 380 lbs. at .04¼c.		$16.15
¼ cost of 30 cross-arms, 6 feet, at 18c.		1.35
¼ cost of 60 bolts and washers, at .01.1c.....		.14
30 steel pins, at .02¾c.		.82
30 screw-glasses, at .02.69c.....		.80
2 lbs. tie-wires, at .04.5c.		.09
⅛ lbs. solder, at .11c.....		.02
63	Labor of foreman and men.....	3.40
	Freight on material.....	1.64
	Total, one mile of wire	$24.41

Instruments in use, State of Missouri, year 1898, No. sets 732, cost	$3,330.60
Duplex in use, State of Missouri, year 1898, No. sets 13, cost.....	869.18
Quadruplex in use, State of Missouri, year 1898, No. sets 61, cost	6,714.88
Repeaters in use, State of Missouri, year 1898, No. sets 33, cost.....	749.10
Wheatstone repeaters in use, State of Missouri, year 1898, No. sets 1, cost	396.25

Wheatstone recorders in use, State of Missouri, year 1898, No. sets 7, cost	525.00
No. cells battery in use, State of Missouri, year 1898, No. sets 4,266, cost	1,791.72
Cost of power plant, St. Louis	10,220.00
Cost of power plant, Kansas City	3,597.00
	$28,093.73

Western Union Plant in Missouri in 1898—*New.*

6,076 miles of poles, at $61.90	$376,104.40
23,763.34 miles of wire, at $21.40	580,159.76
Batteries, instruments, etc.	28,093.73
Total, new plant	$984,357.89

EXHIBIT E.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 49. Invoice No. 2322.

CHICAGO, *Ap'l* 27, 1898.

I have this day shipped to W. U. Tel. Co., care S. K. B., Sedalia, Mo., via. Wab., care M. K. & T. R., Hannibal, the following material for rep'rs of line M. K. & T. R. R.

64 Est. *Mo.* —. S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles, $1.10 ..... $110.00

Wab. 30932.
From M. & Co., Beaver, M.

EXHIBIT F.

Supply dep't No., 5712. Sup't's No., 538.

Supply department, Western Union Telegraph Co., Chicago, Ill.

Invoice of Supplies Shipped to M., K. & T. R'y by Pac. X in — Bbls., 2 Boxes, — Cases, — Casks, — Pkgs.

Date, 4, 2, '98.

Packed by —— ——.
Checked by —— ——.

Check.	Articles.	Battery instruments.	Station-ery.	Miscella-neous.	Total.
18	Keys	.....	.....	.....	$12.60
13	Relays	.....	.....	.....	32.50
9	Sounders	.....	.....	.....	13.05
1	Box relay keys	.....	.....	.....	4.20
					$62.35

To W. U. Tel. Co., care S. H. Bullard, S. F., Sedalia, Mo.:

Please acknowledge receipt hereof when supplies are to hand and and also note condition, then return this to me.

T. P. COOK, *Sup't.*

Packages should be examined thoroughly for all articles noted; pens, pencils and other similar articles, when shipped in small quantities, are packed in small envelopes and should be searched for carefully. Receipt this invoice and return it to your superintendent. Articles received, and amount of the same taken this 5th day of April, 1898.

S. K. BULLARD,
D. Sup't Tel.

65 EXHIBIT G.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 374. Invoice No. 2057.

CHICAGO, 4, 14, 1898.

I have this day shipped to W. U. Tel. Co., care S. C. Kinsman, Moberly, Mo., via Wabash R. R., the following material for reconst. of line Moberly to Ottumwa.

Est. No. 8. S. C. MASON, *Storekeeper.*

500 25-ft. 6-inch poles, $1.10..... $550.00

Wab. 30814
" 32387
" 30924
" 31532
" 30858
} From Muller & Co., Spalding, Mich.

EXHIBIT H.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 49. Invoice 2351.

CHICAGO, 4, 26, 1898.

I have this day shipped to W. U. Tel. Co., care S. K. B., Sedalia, Mo., via Wabash, care M. K. & T., Hannibal, Mo., the following material for rep. of line M. K. & T. R. R.

Est. No. — S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles..... $110.00

M. K. & T., 3886.
M. & Co., Compton, Mich.

EXHIBIT I.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 689. Invoice No. 1195.

66 CHICAGO, 3, 3, 1898.

I have this day shipped to W. U. Tel. Co., care R. H. Innes, S. Tel., San Antonio, Tex., via below, the following material for rep's of line S. A. & A. P. R'y.

Est. No. — S. C. MASON, *Storekeeper.*

200 25–6 poles, $1.05 ..... $210.00

D 10854
" 10083

From Monroe, Mich., L. S. & M. S. R'y. Care Wabash R'y, Toledo, O. Care M. J. & T. R'y, Hannibal, Mo. Care S. A. & A. P., Waco, Tex.

EXHIBIT J.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 32. Invoice No. 1583.

CHICAGO, 3, 23, 1898.

I have this day shipped to W. U. Tel. Co., Sedalia, Mo., the following material for rep's of line Mo. Pac. R'y.

S. C. MASON, *Storekeeper.*

800 6-ft. arms, 18c. $144.00

Sup't Cockey's No. 1745.
Storekeeper's No. 4227–1583.

EXHIBIT K.

Supply department, Western Union Telegraph Co., western division.

District No. 2.

Requisition No. 723. Invoice No. 1131.

CHICAGO, 3, 1, 1898.

I have this day shipped to W. U. Tel. Co., Sedalia, Mo., the following material for rep's of line Mo. Kan. & Texas railway.

500 6-ft. arms, 18c. $90.00

Sup't Cockey's No. 27078.
Storekeeper's No. 4118.

67 EXHIBIT L.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 118. Invoice No. 1396.

CHICAGO, 3, 14, 1898.

I have this day shipped to W. U. Tel. Co., care H. C. Sprague, sup't tel., Kansas City, Mo., via Wab. R'y, the following material for rep's of line K. C. F. S. & M. R'y.

S. C. MASON, *Storekeeper.*

925 lbs. No. 8 wire, 4.1	$39.03
580 lbs. No. 9 wire, 4¼	24.65
215 lbs. No. 11 wire, copper, 13⅛	28.22
1000 glass, 2.69	26.90
3000 steel pins, 2.75	82.50
200 Ferm pins, 3.60	7.20
1000 bolts & wash., 1.50	15.00
150 lbs. iron ties, 4½	6.75
25 lbs. copper ties, 14⅛	3.53
50 lbs. solder, 7.60	3.80
10 solder'g sticks, 12	1.20
100 14-inch mch. B., 1.60	1.60
100 14-inch eyeb., 5½	5.50
50 6-inch eyeb., 5	2.50
40 stirrup irons, 7½	3.00
150 19c. pipe straps, 12	.72
150 10c. pipe straps, 12	.48
For'd	$252.58

EXHIBIT M.

Supply department, Western Union Telegraph Co., western division.

68 District 2.

Requisition No. 374. Invoice 2166.

CHICAGO, *Ap'l* 18, 1898.

I have this day shipped to Wab., care G. C. K., Moberly, Mo., via Wab., the following material for recon. of line Moberly to Ottumwa. Est. 8.

S. C. MASON, *Storekeeper.*

200 25-ft. 6-inch poles, $1.10	$220.00

Wab. 32252.
" 32535.

From Muller & Co., Beaver, Mich., G. C. Kinsman, sup't.
Dec. — ——.

EXHIBIT N.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 374. Invoice 2253.

CHICAGO, 4, 23, 1898.

I have this day shipped to G. C. Kinsman, S. T. Wab., Moberly, Mo., via Wab., the following material for reconst. of line Moberly to Ottumwa.

Est. No. 8. S. C. MASON, *Storekeeper.*

195 25-ft. 6-inch poles, $1.10..... $214.50

Wab. 30796.
" 14377.
M. & Co.
Ship- from Brampton, Mich.

EXHIBIT O.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 726. Invoice No. 2167.

CHICAGO, 4, 16, 1898.

I have this day shipped to W. U. Tel. Co., care S. K. Bullard, sup't, Denison, Tex., via Wab., care M. K. & T., Hannibal,
69 Mo., the following material for rep'rs of line M. K. & T. R. R.

S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles..... $110.00

Wab. 32531.
From Muller & Co., Spalding, Mich.
S. K. Bullard, sup't.

EXHIBIT P.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 139. Invoice No. 2364.

CHICAGO, 4, 28, 1898.

I have this day shipped to W. U. Tel. Co., care L. F. Sheldon, s't, Sedalia, Mo., via Wab., care Mo. Pac., St. Louis, Mo., the following material for rep'rs of line Mo. Pac. R. R.

S. C. MASON, *Storekeeper.*

100 25-ft. 5-inch poles..... $110.00

Wab. 30891.
From Mueller & Co., Spalding, Mich.

EXHIBIT Q.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 726. Invoice No. 2252.

CHICAGO, 4, 21, 1898.

I have this day shipped to W. U. Tel. Co., care S. K. Bullard, Denison, Tex., via Wab., care M. K. & T. R'y, Hannibal, the following material for rep'rs of line M. K. & T. R. R.

S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles..... ..... $110.00

Wab. 30709.
M. & Co.
Ship'd from Beaver, Mich.

70 EXHIBIT R.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 129. Invoice No. 2366.

CHICAGO, 4, 29, 1888.

I have this day shipped to W. U. Tel. Co., care L. F. Sheldon, A. S. T., Sedalia, Mo., via Wab., care Mo. Pac., St. Louis, the following material for rep's on line Mo. Pac. R. R.

S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles..... $110.00

Wab. 30757.
From Mueller & Co., Spalding, Mich.

EXHIBIT S.

Western Union Telegraph Company.

Elencious Smith, attorney.
George J. Frankel, assistant general manager.

Mr. SMITH: If the board please, I desire to simply say a few words with respect to the return of the Western Union Telegraph Company. The return made this year, separated for the different counties, as required, is on the poles 6,075.98 miles at fifty dollars per mile, $303,799; and 23,764.34 miles of wire, at ten dollars per

mile, $237,673.40—a total of $541,472.40. My recollection of the statute under which the board of equalization assesses telegraph and telephone and bridge property is that it should be the duty of the board to fix the value of the real and personal property and the franchises, it being one of the few statutes, perhaps the only one, in which the franchise is specifically mentioned. Now it is, I assume, known to the board that the Western Union Company is not a Missouri corporation, and therefore we cannot avail ourselves of any of the franchises given by the State of Missouri to telegraph companies organized under the laws of the State. The original act of 1855 gave all telegraph companies the right to place their poles
71 along the streets, highways and roads of the State, but that was changed subsequently, it is immaterial when, because it has been the law for many years, so as to limit that franchise, which is a most important one, to telegraph companies organized under the laws of the State of Missouri. And when we had our contest with the city of St. Louis, I found that we could not avail ourselves of that right, and the Supreme Court of the United States decided that while as an instrument of interstate commerce, existing under Federal incorporation, we must be permitted to go into the various States and cities, yet we were bound to pay whatever charge was reasonable, and the only way, I may say for the information of the board, we escaped that payment for the time being was by an absolute showing that of our fourteen hundred poles in the city of St. Louis, nine hundred were actually used by the city, and in many instances, to a greater extent than the Western Union used them itself; that the cost to us of maintaining those poles, which we had to do for the city under the contract rate, was really almost as much as the Western Union itself got from it, and therefore they said, "If you maintain that service under a contract rate with the city to use every pole you have, and the top cross-arm, which is the choice arm, it cannot say to you, 'You shall pay for using the streets and at the same time maintain this service at this enormous cost.' But the moment the city takes its wires from that pole, or series of poles, it then has the right to charge us for occupying that space, any sum that is reasonable." I apprehend this is one of the most valuable franchises that a telegraph company in Missouri can have, because the legislative act permitting all telegraph companies to put up their poles, etc., along the streets and highways, would, in my judgment, mean, without question—for instance, if I form tomorrow the Jefferson County Telegraph Company, I would have a right to do that without any of the municipalities being allowed to charge me for that franchise given by the act of the State. There has, of course, arisen out of
72 this Federal grant, a corresponding burden, which, during the late war, was a very great one. The contract of the Western Union with the Government, under act of 1866, with the Government of the United States, is that they shall give priority to all governmental messages; that they shall send them at such rates as may be prescribed by the Postmaster General, and that the United States

shall have at any time the right of purchasing the Western Union at a price fixed by arbitration, so that, if the United States chooses to exercise this right, it could acquire the Western Union plant under that sort of valuation. I mention those facts merely to call the board's attention to the subject of the franchise because while we have the ordinary police protection and things are incidental to the State government, yet on the other hand, I believe, so far as I personally know, it has been the disposition of the company to pay its fair proportion of the taxes. Now we have made up a list, if the board please, of the items that go into a mile of wire, because that is the way the calculations seem to be made. The actual cost of a mile of poles, thirty poles to the mile, is $39.91, together with the arms, bolts, washers, pins and staples. Those figures are taken from the actual invoices, poles as they are made to us. Those poles and material are obtained from other places, as a rule, so of course there are certain freight charges to get them to Missouri. The freight on the poles and material amount to, on a mile of poles, $8.46. The labor of erecting them averages seventy-five cents—wire, glasses, and solder, $17.06, making the total cost $20.72. The average cost for a complet mile of wire, labor, freight, etc., would be $94.00. Now we have in Missouri, 6,075.98 miles of poles, and 23,767.34 miles of wire. If all that property was duplicated today, so as to make it an absolutely new plant, it can be done for $938,253.93, to which should be added about $28,000, the cost of the large offices at either end. Now the board's assessment last year against us was $450,000 in excess of that figure; in other words,
73 substantially four hundred and pretty near sixty thousand dollars our actual figures show we could reconstruct our entire system for today, and I think we are justified in saying that we feel that that figure is a greater valuation than ought to be imposed upon the physical property, because, as is well known, the company is a very old one. I know my testimony in the city case developed that many of the poles along Third street had been there sixteen years, and I believe the average life of a pole is about twenty years. In fixing the figure at $541,000, which I think is substantially sixty per cent. of the cost of a new plant, why I think that Mr. Cook was giving a figure that would certainly not be below the actual value. I do not know myself in the sense of second-hand material but that it would fairly represent the actual cost of the property, less whatever the average depreciation would be, and that $450,000, if we assume that the system is worth now what it was then, why the assessment of the board last year would exceed the cost of a new plant in the State of Missouri by about $450,000. I would like to leave for the information of the board this memoranda, which will show you in detail what the actual cost of material, etc., is. That is taken from our books.

Which said statement is as follows:

Present Cost per Mile of Telegraph Line, Poles, and Wires.

30 poles at $1.10	$23.00
30 arms, 18c	5.40
60 bolts and washers, .011	.66
30 pins, .02¾	.82
1 lb. staples, .03	.03
	$39.91
Freight on poles and materials	8.46
Labor, foreman and men	25.00
	$73.37
74 1 mile No. 8 wire, 380 lbs., at 4¼c	16.15
30 glasses, at $2.69	.80
2 lbs. ties, at 4½c	.09
⅛ lb. solder, at 11c	.02
	$17.06
Freight on wire and material	1.16
Labor, foreman and men	2.50
	$20.72

In the State of Missouri, we have 6,075.98 miles of poles, and 23,767.34 miles of wire.

This property, brand new, could cost $938,253.93.

For the year 1898 the total assessment against this company was $1,392,506.07.

Total taxes paid, $18,745.13.

STATE OF MISSOURI,
Office of State Auditor.

I, James M. Seibert, State auditor of the State of Missouri, do hereby certify that the above and foregoing is a true, full and complete copy of the remarks made before the State board of equalization by Mr. E. Smith respecting the assessment of the property of the Western Union Telegraph Company for taxes of 1899, as fully as the same remains on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State auditor. Done at office in the city of Jefferson, this 11th day of June, 1900.

[SEAL.]

J. M. SEIBERT,
State Auditor.

The defendant here rested its case.

And the foregoing was all the evidence offered in the case.

And thereupon the plaintiff asked the court to declare the
75 law as follows:

1. The court declares the law to be that if it appears from

the pleadings and the evidence that this is a suit against defendant for the collection of taxes upon an assessment made by the State board of equalization and assessment, and that no question is made upon the legality of any of the proceedings except only the assessment made by the said State board, and if it appears that said State board assessed and equalized the property of defendant in Missouri, after duly considering the evidence at a hearing in which defendant participated, and made the assessment as follows, to wit:

6,075.98 miles of poles, at $71.00 per mile	$434,432.57
23,767.34 miles of wire, at $22.00 per mile	523,336.82
2,375 instruments at $5.70 each	13,537.50
All other property	856,400.56
Total	$1,827,725.45

And if it appears further from the answer of the defendant that at the date of said assessment it owned in the State of Missouri the number of miles of poles and wires and the number of instruments above set forth and also other property, then the finding and judgment must be for the plaintiff for the whole of the taxes sued on.

2. The court declares the law to be that the assessment and valuation made by the State board upon the poles, wires and instruments owned by defendant in this State is final and conclusive and is not subject to review or attack in this suit.

3. The court declares the law to be that the assessment and valuation made by the State board upon all other property owned by the defendant in the State of Missouri is final and conclusive and is not subject to review or attack in this suit.

4. The court declares the law to be that if it appears from the evidence that in arriving at the value of all other property owned by the defendant in the State of Missouri and subject to taxation, the said State board considered the facts set out in the returns and statement of the company, and all evidences of value, and
76 matters bearing upon the question of the value of the property of the company, cost of construction and equipment, the location thereof, its traffic and business, the market and par value of its stocks and bonds, the gross receipts and net earnings, and the franchise owned by said company, and the value thereof; and also evidence concerning the value of the cost of construction of the telegraph line, the market value and the par value of the stocks and bonds, gross receipts and net earning power, the franchise and value thereof, and fixed the value of all other property after such consideration at the sum of $856,400.56, then the finding of said State board is conclusive and is not subject to review or attack in this suit, and the judgment must be for plaintiff.

5. The court declares the law to be that all the property, real and personal, including the franchise owned by defendant telegraph company, being in and operated in the State of Missouri, is subject to taxation in said State of Missouri, for State, county, municipal and other local purposes to the same extent as the property of private persons.

Which declaration number 2 the court gave, over the objection of the defendant, and to which ruling of the court in giving said declaration so numbered the defendant, by its counsel, at the time duly excepted and still excepts.

The court refused to give declarations numbered 1, 3, 4 and 5, to which ruling of the court in refusing to give said declarations of law so numbered, and each of them, the plaintiff, by its counsel, at the time duly excepted and still excepts.

And thereupon the defendant asked the court to declare the law as follows:

1. From the evidence, the court finds that the third item of the tax bill sued on designated as "on all other property" was intended to embrace the right of the defendant to operate a telegraph system along and over the post-roads of the United States, under a
77 contract between the defendant and the United States, by which contract the United States was given the precedence in the transmission of all messages, and which gave to the United States the right to establish the charges to be paid for such service, and by it the United States is given the right to purchase said system, at any time, at a price to be fixed by a board of arbitrators. On this state of facts, the court declares the law to be that as to said third item the plaintiff cannot recover.

2. The court declares the law to be that a franchise derived from the United States giving to the defendant the right to construct and operate its telegraph system along the post-roads of the United States is not subject to taxation by the State of Missouri.

3. The court declares the law to be that when the defendant accepted the terms of the act of Congress set out in defendant's answer, and undertook and agreed to place its poles and wires along and over the post-roads of the United States, in consideration of which the defendant agreed to give the United States precedence in the transmission of its messages at such price as the United States might name and further agreed to sell its telegraph system at any time to the United States on such terms as a board of arbitrators might determine, the defendant then became an agency of the United States and such privilege or franchise cannot be assessed and taxed by the State of Missouri.

4. The court declares the law to be that all property ought to be assessed and taxed in proportion to its value and that such assessment and taxation should be uniform. The court finds that it is the established rule in this State to place for taxing purposes a value on property of about forty per cent. of its actual value, but that in assessing the property of defendant named in the first and second items of the tax certificate sued on in this case, a value was placed thereon greatly in excess of forty per cent. On this state of facts the court declares the law to be that as to such excess the
78 plaintiff cannot recover.

Which declarations numbered 1, 2 and 3 the court gave over the objection of the plaintiff, to which ruling of the court in giving said declarations of law so numbered, and to the giving of

each of them, the plaintiff, by its counsel, at the time duly excepted and still excepts.

The court refused to give said declaration of law numbered 4, to which ruling of the court in refusing to give said declaration so numbered, the defendant, by its counsel, at the time duly excepted and still excepts.

And afterwards, to wit, on the 22nd day of January, 1901, the court, under the pleadings, the evidence and the declarations of law given as aforesaid, gave judgment as follows:

"The court finds the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of the said assessment, the poles, wires and instruments of the value hereinbefore set forth.

"And the court finds the fact to be from the evidence that in valuing 'all other propety' of defendant the State board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation and as to this item of the above-named valuation the court finds the issues for the defendant.

"It is therefore considered, ordered and adjudged by the court that the plaintiff recover of the defendant for its taxes for the year 1899 upon the assessment as made by the State board of equalization against the poles, wires and instruments of the defendant as above set forth. The items of said tax and the apportionment for the county of Jackson being in the following amounts:

79	For State purposes	$117.40
	For county purposes	164.37
	For road purposes	20.54
	For general county-school purposes	214.95
	For school-building purposes	1.74
	For other school purposes	11.04
	For Kansas City municipal purposes	57.13
	For Independence municipal purposes	14.72
	For Kaw township railroad purposes	1.18
	For Blue township railroad purposes	2.75
	Total	$605.82

together with interest upon the total amount so found to be due from the defendant at the rate of one per cent. per month from the first day of January, 1900, to date, amounting to $—.

"And also for two per cent. of the gross sum found to be due from defendant for the commissions of the collector of the revenue; and also a reasonable fee for the attorneys of the plaintiff, to be hereafter determined by the court and taxed as costs against the defendant.

"It is further found by the court that the gross sum due from the defendant is a first lien against the property of the defendant in the county of Jackson and State of Missouri, and it is therefore ordered

and adjudged by the court that the plaintiff recover of defendant the amount as above mentioned for its taxes for the year 1899 and for costs and interest thereon, and that special execution be levied out of the property of the defendant as above set forth."

And afterwards, and within four days, to wit, on the 24th day of January, 1901, the plaintiff filed its motion for a new trial in the words and figures following:

Motion for a New Trial.

Now on this 24th day of January, 1901, comes the plaintiff
80 in the above-entitled cause and moves the court to set aside the verdict and judgment rendered in said cause on the 22nd day of January, 1901, and to grant plaintiff a new trial therein, for the following reasons:

1. The verdict in said cause is against the evidence, against the weight of the evidence, and against the law under the evidence.
2. The verdict should have been for the plaintiff for the total amount claimed.
3. The court erred in admitting incompetent, immaterial and irrelevant evidence offered by the defendant over the objection of plaintiff.
4. The court erred in the declarations of law given at the instance of the defendant.
5. The court erred in the declarations of law given on its own motion.
6. The court erred in refusing the declarations of law asked by plaintiff.
7. The court erred in admitting any evidence over the objection of the plaintiff to sustain the second and third allegations in the defendant's answer.

Which motion for a new trial was on the 26th day of January, 1901, overruled by the court. To which ruling of the court the plaintiff at the time excepted.

And also within four days, to wit, on the 24th day of January, 1901, the defendant filed its motion for a new trial in the words and figures following:

Now on this day comes the defendant in the above-entitled cause and moves the court for an order setting aside the judgment and granting it a new trial for the following reasons, to wit:

(1.) The uncontradicted evidence shows that the rule for assessing property generally in this State is on a basis not to exceed forty per cent. of its actual value, while the property of the defend-
81 ant was assessed by the State board of equalization on a basis of full actual value, by which the defendant was denied the equal protection of the law and was in violation of the Constitution of the United States as provided by the fourteenth amendment thereto. And the court erred in not reducing the amount of such valuation.

(2.) The court erred in refusing the fourth instruction asked by defendant.

(3.) The court erred, against defendant's objections, in excluding legal and competent evidence offered by the defendant as to the actual value of defendant's property in this State.

(4.) The court erred in giving the instructions asked by the plaintiff.

Which motion for a new trial was on the 26th day of January, 1901, overruled by the court: To which ruling of the court the defendant at the time duly excepted.

And afterwards, to wit, on the 26th day of January, 1901, the plaintiff filed affidavit for appeal in the words and figures following:

Affidavit for Appeal.

STATE OF MISSOURI, } ss:
County of Jackson, }

Now on this 26th day of January, 1901, being at the regular January term of the court, comes the plaintiff in the above-entitled cause by Chris Gottleib, the relator therein, and the said Chris Gottleib, being duly sworn, upon his oath says that the appeal prayed for by the plaintiff is not made for vexation or delay, but because he considers the plaintiff aggrieved by the judgment and decision of the court.

CHRIS GOTTLEIB, *Relator.*

Subscribed and sworn to before me this 26th day of January, 1901.

H. M. STONESTREET, *Clerk,*
[SEAL.] By H. O. PAYNE, *D. C.*

82 And also, to wit: on the 26th day of January, 1901, the defendant filed affidavit for appeal in the words and figures following:

Now comes the defendant herein and prays the court for an appeal from the verdict and judgment heretofore rendered herein to the supreme court of Missouri.

DICKSON & SMITH,
KARNES, NEW & KRAUTHOFF,
Attorneys for Defendant.

STATE OF MISSOURI, } ss:
County of Jackson, }

J. V. C. Karnes, of lawful age, on his oath deposes and says he is one of the attorneys for the defendant in the above-entitled cause; that this appeal is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the judgment and decision of the court.

J. V. C. KARNES.

Subscribed and sworn to before me this 26th day of January, 1901.

My commission expires June 13, 1902.

A. F. SMITH,

[SEAL.] *Notary Public, Jackson County, Mo.*

Wherefore the said plaintiff and defendant pray the court to settle this their bill of exceptions to all and singular the acts, rulings and orders of said court in the premises, and that the same may be signed, sealed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Honorable John W. Henry, judge of division No. 4 of said circuit court, before whom the said proceedings were had, this 23rd day of February, 1901.

JNO. W. HENRY, [SEAL.]
Judge of the Circuit Court, Div. No. 4.

The foregoing bill of exceptions approved as correct this 19th day of February, 1901.

83 H. M. MERIWETHER,
Attorney for Plaintiff.
DICKSON & SMITH,
KARNES, NEW & KRAUTHOFF,
Attorneys for Defendant.

Opinion of Judge Henry of the Circuit Court of Jackson County, Mo., in the Case of State of Missouri ex Rel. Collector vs. Western Union Telegraph Company.

The Western Union Telegraph Company was incorporated under the laws of the State of New York, and, after it had been operating under its charter from that State the Congress of the United States passed an act providing that, if the company would accept the provisions of the act it should have the privilege of setting its poles and stretching its wires on and along any postal road of the United States. By the provision of the act, the Postmaster General of the United States was authorized, on the first of January of each year, to prescribe the rates for the transmission of telegrams by Government officials, and that these telegrams should have precedence over all other messages. It was further provided that the company should sell its line to the Government, at the option of the Government, at a price to be fixed by arbitrators to be selected as provided by that act.

By the statute of Missouri the franchises of telegraph companies are made taxable for State, county and municipal purposes.

The principal and controlling question in this case is, whether the franchise of the Western Union is taxable under that law, the attorneys for the company contending that inasmuch as it derived no franchise from the State, but its right to place its poles and wires on and along the postal roads of the United States, in this State, and conduct its business here was derived from the Government of the

United States and is a Government agency, under the act of Congress, *supra*, the State cannot impose a tax on the franchise.
84 It is an important question, and has been ably and plausibly argued by the counsel on both sides.

It is conceded that a franchise is property,—often the most valuable property of a corporation, more valuable than its corporeal possessions.

The mere fact that a franchise is derived from the Government of the United States would not, I should think, exempt it from taxation by the State in which it is exercised.

The title to all the real estate in Missouri was derived from the General Government. Thousands of acres are owned by parties who received their land as a bounty from the Government for military services, or others who derive their titles from them or their heirs or grantees, yet it would not be contended that such lands are non-taxable by the State because originally derived from the Government of the United States.

If the franchise of the Western Union is non-taxable, it must be on the sole ground that it is a Government agency, for on no other ground can the position that it is non-taxable by the State be maintained.

In the celebrated leading case of McCullough against Maryland, it was held by the Supreme Court of the United States that a branch of the Bank of the United States, located at the city of Baltimore, could not be taxed by the State of Maryland, because it was a Government agency, created by the Government of the United States for its own convenience and purposes, and that to recognize the right of the State to impose a tax upon it would be to concede a power in the State to destroy or so cripple and hamper the branch bank as to defeat the end of its creation by the General Government.

The difference between the facts of that case and this is that the Government of the United States did not incorporate the Western Union, which obtained its charter from the State of New York, and was actively engaged in transacting business
85 under its charter before the act of Congress, *supra*, was created.

Does the fact that under that act of Congress the Government had an arrangement, a contract, with the Western Union for the transmission of its messages, bring it within the principle of the case of McCullough against Maryland? If so, then it must be held that the State of Missouri cannot levy a tax upon its franchise; and every railroad, express company, and telegraph company in the United States, by contracting with the Government for the transportation of troops, munitions of war, or other Government property, or the transmission of Government messages over the telegraph lines, can withdraw all their franchises from taxation by the State within which they are operated. If this were a new question, I should incline to hold that the franchise is taxable by the State.

It is property, the most valuable property owned by the Western Union. Without the franchise, its lines, the poles and wires would

have no value except what they would be worth as raw material, but by reason of their right to use them in the transaction of their business their value is greatly enhanced.

That the franchise was created by the General Government cannot exempt it from taxation by this State, unless it is owned by the General Government or unless the Government by its contract with the Western Union and by granting to that company its franchise to operate its line in the State has made it a Government agent. The decisions of the courts present several anomalies and apparent contradictions.

If the State cannot tax the franchise, which is property, because the Western Union is a Government agency, upon what principle can it impose a tax on the tangible property of the company, its poles, wires and instruments, which it is conceded the State may tax? The visible tangible property is that which is directly employed by the company in serving the Government under this contract.

If the State could cripple and destroy this agency and
86 thus seriously incommode the Government by taxing its franchise, it might accomplish the same result by taxing its tangible property; and yet in The Western Union Telegraph Company against Mass., 125 U. S., 125, it was virtually held that the franchise of the company might be considered as an element of value in estimating the value of the other property of the Western Union Telegraph Company.

It strikes me that the argument of the defendant would exempt from State taxation not only the franchise, but all the other property of the defendant.

But I cannot set up my opinion against that of the Supreme Court of the United States, which in the Pensacola Telegraph Company against the Western Union Telegraph Company, 96 U. S. 1, held that the powers given to the Western Union Telegraph Company by the act of Congress of July 24, 1866, cannot be obstructed by State legislation, and that the power of a State to tax its franchise would enable the State to place obstructions in the way of its usefulness. The franchise granted the Western Union by the State of New York conferred no right upon the company beyond the limits of that State.

The act of Congress of 1866 gave that company all the rights it has in Missouri, and may be regarded as a new and distinct charter to the company by the Government for Government purposes so far as its existence in this State is concerned. It is a Government agency under the decisions of the Supreme Court of the United States above cited.

In California *v.* Pacific R. R. Company, 127 U. S. 1, the facts of one branch of the case were that the Southern Pacific R. R. Company was a corporation existing under the laws of California, but received an additional franchise from the Government of the United States, and on this franchise the State attempted to impose a tax. The court said:

"Assuming then that the Central Pacific railroad has received the

important franchise referred to by grant of the United States,
87 the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away nor destroy or abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situate within the State. This is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot."

The Central Pacific, it is true, derived its charter from the Government of the United States, but the court in the same opinion, held that the franchise granted by the Government of the United States to the Southern Pacific was not subject to taxation by the State of California.

In the case at bar the right to plant its poles, stretch its wires and transact its business in this State is clearly a franchise; if not, it has no franchise to tax, and if a franchise, it was granted by the Government of the United States, is an agency of the United States as held by the Supreme Court of the United States, and under the foregoing decision of that court is not subject to State taxation.

In San Francisco against The Western Union Telegraph Company, 96 Cal., 140, the precise question involved in this case was carefully considered by the supreme court of California, and decided favorably to the Western Union without a dissent. Other courts have held the contrary, but as this case, if as vigorously contested as the importance of the question involved would justify, must ultimately be determined by the Supreme Court of the United States, I feel constrained to follow that rather than the State court whose opinions are not in harmony with those of the Supreme Court of the United States.

The State board of equalization placed a value on the
88 defendant's telegraph line, its poles, wires and all other property not included in that which the law requires the company to give in to the county assessor, and then fixed the value of all other property including and specifying the franchise. In fact, as disclosed by the testimony in the case, there was no other property except the poles, wires and instruments and that which had already been listed with the county assessor. It was in effect an attempt to tax the franchise as distinct from the visible property, but whether this is so or not the entire assessment as to the franchise and the other property, as classified by the State board of equalization, must fall to the ground. For if the franchise is not subject to taxation by the State, and there was other property than that specified in the first class of property valued by the board, the assessment of the franchise and such other property in gross, without a separate valuation of the franchise and the other property, *inviolates* the entire assessment as held by the Supreme Court of the United States. It follows that the judgment must be for defendant on that item of plaintiff's demand.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, H. M. Stonestreet, clerk of the circuit court within and for the county and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the opinion of Judge Henry in the cause entitled State of Missouri *ex rel.* collector, plaintiff, against Western Union Telegraph Company, defendants, No. 38998, as the same now appears of record and on file in my office.

In witness whereof, I hereunto set my hand and affix the seal of said circuit court, at office in Kansas City, this twenty-sixth day of January, A. D. 1901.

[SEAL.] H. M. STONESTREET, *Clerk.*
D. M. M'CLANAHAN, *D. C.*

89 And afterwards to wit, on the 26th day of March, 1901, the further following proceedings were had in said cause, viz.

STATE *ex Rel.* CHRIS. GOTTLEIB, Resp., }
v.
WEST. UN. TEL. CO., App. }

Now at this day, the court having fully considered and understood the motion this day filed to advance this cause on the docket, doth order that said motion be sustained, and that this cause be set for hearing at the next call of cases in court in banc.

Which said motion to advance is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1901.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLEIB, Collector, Appellant, }
vs.
WESTERN UNION TELEGRAPH COMPANY, Appell*ant.* }

Motion to Advance Cause.

Now on this day comes the defendant herein and moves the court to advance the above-entitled cause upon the docket of this honorable court, and set the same for hearing before the court in banc at as early a date as may suit the convenience of the court, and for grounds of such motions says:

(1.) This is an action by the State of Missouri at the relation of Chris Gottleib, collector of the revenue for Jackson county, Missouri, against the Western Union Telegraph Company. The object
90 of the suit is to recover the State, county, school, municipal and other taxes levied against the Western Union Telegraph Company for the year 1899. (Petition, Abstract, pages 1 and 2.)

(2.) It appears that the State board of equalization on July 25, 1899 assessed the property of the Western Union Telegraph Com-

pany for taxation in that year at $1,827,727.45, distributed as follows:

6075.98 miles of poles at $71.50 per mile.....	$434,432.57
23767.34 miles of wire at $22.02 per mile.....	523,356.82
2375 instruments at $5.70 each.....	13,537.50
All other property.....	856,400.56
Total.....	$1,827,727.45

(Abstract, page 41.)

It appears that said property is distributed among one hundred of the counties of the State of Missouri and the city of St. Louis. (Abstract 42–47.) The taxes for State purposes alone on this assessment, being fifteen cents for revenue and ten cents for interest, amount to $4,569.31. An action similar to the case at bar is pending in all of the said one hundred counties of the State of Missouri, and the city of St. Louis, which said actions are awaiting the determination of this cause.

(3.) The defendant further says that by its answer two defenses are made to the taxes levied as above stated. (Answer, Abstract, pages 3–12.) The first defense is as to the physical property of the company, the poles, instruments and wires, being the first three items above set out, the assessment was void, or at least excessive, because not made upon the same basis or percentage of value as that upon which other property was assessed. In other words, the said poles, instruments and wires were assessed at more than the cost of replacement with new material, when other property of the State of Missouri was being assessed at only forty (40) per cent. of its
91 fair value. As to this defense, the trial court found against the defendant, and the defendant is appealing from that finding.

The second defense is that the items set forth as "all other property," $856,400.56, are the right of the Western Union Telegraph Company to operate a telegraph system along and over the post-roads of the United States under a contract between the defendant and the United States, by which contract the United States was given precedence in the transmission of all messages, and which gave to the United States the right to establish the charges to be paid for such service, and by which the United States is given the right to purchase said system at any time, at a price to be fixed by a board of arbitrators.

As to this defense the finding of the court was for the defendant, and the plaintiff is appealing from that finding.

(4.) Defendant further states that the State board of equalization at its meeting in the year 1900 assessed the property of the defendant for taxation for State, county, municipal, school and other purposes, at the sum of $1,827,727.45, and that said board has organized and is about to hold its sessions in the year 1901, and it is a matter of great importance not only to the defendant in the case at bar, but to the State of Missouri and its various governmental divisions, that

the questions presented by the cross-appeals in the case at bar should be speedily and promptly determined.

All of which is respectfully submitted.

DICKSON & SMITH,
KARNES, NEW & KRAUTHOFF,
Attorneys for Western Union Telegraph Company.

The undersigned, attorneys for the State of Missouri *ex rel.* Chris Gottlieb, collector, join in the above and foregoing motion,
92 and do ask the court to advance this cause for hearing before the court in banc at as early date as is convenient for the court.

HUNTER M. MERIWETHER,
Attorney for State ex Rel. Collector.

And afterwards, to wit, on the 26th day of April, 1901, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* CHRIS GOTTLEIB, Resp.,
v.
WEST. UN. TEL. CO., App.

Come now the said parties by attorneys, and after argument herein, submit this cause to the court.

And afterwards to wit, on the 3rd day of December, 1901, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* CHRIS GOTTLEIB, Collector, Plaintiff, Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant, Appellant.
} Appeal from Jackson County Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson county circuit court rendered, be in all things affirmed and stand in full force and effect on the defendant's appeal herein; and that the said plaintiff recover against the said defendant his costs and charges herein expended, and have therefor execution. It is further considered and adjudged by the court that the judgment aforesaid, in form aforesaid, by the said Jackson county circuit court rendered, holding that the tax assessed against "all other property at $856,400.56" to be unlawful, be reversed, annulled and for naught held and esteemed; that the said plaintiff be restored to all
93 things which he has lost by reason of the said judgment; and that a judgment be entered here in favor of said plaintiff for the sum of $1027.22, back taxes for the year 1899, with interest thereon from the first day of January, 1900, at the rate of one per

cent. per month. It is therefore considered and adjudged by the court, that the said plaintiff recover of the said defendant for its taxes for the year 1899, the sum of one thousand and twenty-seven dollars and twenty-two cents ($1027.22), together with interest upon said amount so found to be due from the said defendant, at the rate of one per cent. per month from the first day of January, 1900, to date, amounting to the sum of — dollars; and that the said plaintiff recover against the said defendant his costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, viz:

In the Supreme Court of Missouri, in Banc, April Term, 1901.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLEIB, Collector, Plaintiff and Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant and Appellant. } No. 10573.

This is an action at law by the collector of Jackson county to recover $1027.22 back taxes for the year 1899.

The answer contains two defences; 1st, that the State board of equalization intentionally discriminated against defendant in assessing its property at its full value, while other property in the State is only assessed at from thirty-five to forty per cent. of its value; and 2nd, that the assessment as to the item "all other property, $856,400.56," is an assessment on its franchise, and that the only franchise it exercises in this State is derived from an act of Congress approved July 14th, 1866 (U. S. Stats. at Large, 1865–'7, pp.
94 221–'22), which constitutes defendant a governmental agency, and an instrument of foreign and interstate commerce, and that under the Constitution and laws of the United States the board of equalization was without authority to impose that item of taxes.

The record discloses the facts to be that the State board of equalization, whose duty it is under the law (section 9387 R. S. 1899) to assess all property, real and personal, "including franchises," of telegraph companies, made the following assessment of defendant's property on the 25th of July 1899:

"STATE OF MISSOURI, }
Office of State Auditor. }

Be it remembered that heretofore, to wit: on the twenty-fifth day of July, 1899, the following among other proceedings were had by the State board of equalization, viz:

The State board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidences of value, and all matters bearing upon the question of the value of the

property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchises owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and of the gross receipts and net earning power, and the franchise and the value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its
95 findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the State board of equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the State board of equalization that the assessed value thereof be distributed upon the said classes of property as follows:

6,075.98 miles of poles at $71.50 per mile	$434,432.57
23,767.34 miles of wire at $22.02 per mile	523,356.82
2,375 instruments at $5.70 each	13,557.50
All other property at	856,400.56
Total	$1,827,727.45."

subject to the right of objection on any sufficient ground in law, it was stipulated between counsel as follows:

1st. That the tax book should be *prima facie* evidence of the validity of the taxes thereon assessed for the year 1899, against defendant, without proof by plaintiff of any of the steps leading up to its execution and issuance; and that said tax book was properly certified.

It was also admitted: First, that defendant, since 1854, has been a corporation, organized and existing under the laws of the State of New York. Second, that as pleaded in the answer, it accepted the provisions of the act of Congress of July 24th, 1866; and that said acceptance has not been withdrawn, and that defendant transmits telegrams for the Government between its departments and officers at rates fixed by the Postmaster General. Third, that defendant is not incorporated under the laws of the State of Missouri, and has never applied for or secured from the State a license authorizing it to do business within the State under the laws thereof.

Objection was made by plaintiff to the introduction of the admission contained in paragraphs 2 and 3, but such objection was overruled and an exception taken.

A general objection was also made by plaintiff to the intro-
96 duction of any evidence by defendant for the reason that the finding and assessment of the State board of equalization was final and not subject to attack in this suit. This objection was overruled and an exception noted.

It was shown on the part of defendant, by the testimony of A. A. Lesueur, secretary of state, and as such a member of the State board of equalization, that the property, outside of St. Louis, is assessed by the local assessors at what he believed to be about thirty-five to forty per cent. of its full value, and in St. Louis at about fifty per cent. thereof, although the city assessor and city board of equalization thought it was seventy per cent. thereof.

It was also shown by the testimony of Edward C. Crow, attorney general, and as such a member of the State board of equalization, that the item of assessment: "All other property at $856,400.36," was intended to include all the taxable property of the defendant other than that specifically mentioned in the three other items, and also its "intangible property, including franchises," but as to how much the franchise value or intangible property was valued at and how much the tangible property other than that specifically enumerated included under the head of "all other property" was valued at, "I could not say."

The attorney general then further testified:

"Q. What do you understand by the meaning of the word 'franchise' as used by you in your direct examination? A. Well, the same sense in which I use it might not be agreed to by lawyers or laymen, without qualification, but I used it in the sense of representing the class of property owned by the Western Union Telegraph Company and controlled by it, such as privileges and rights to erect and maintain their poles and wires, to carry on their traffic in the different portions of the State of Missouri in connection with their rights to so erect their poles and wires and carry on their traffic wherever else their lines extended in this country and other
97 countries, representing a unity of use in the entire corporate property, making the same thereby much more valuable than it otherwise would be for use separately and independently in each Territory or country.

"Q. And therefore the privilege to be or to exist does not enter into your idea at all in the matter of values as you have explained by way of franchise? A. Oh, no, as I understand it the Western Union corporation acquires their right to exist as a corporation from an act of the Federal Congress; they have this, however, which I did not consider, and that is the right to use the posts of the Federal Government. I did not consider that as an element in fixing the franchise value of property in the use of my term of the word 'franchise,' although it might properly be considered, as the courts have held in a Massachusetts case, but I did not have that in mind when I used the word 'franchise.'"

It was further shown by the testimony of Theodore P. Cook, superintendent of the defendant, that all the property owned by the defendant on June 1st, 1898, in Missouri, outside of St. Louis, Kansas City and St. Joseph, other than that specifically enumerated would not exceed $1000, and that it had paid the taxes on the property located in the three cities and subject to local assessment there. Mr. Cook further testified that the defendant's whole system and plant in Missouri could be replaced absolutely new for $984,357.89,

and that its present system or plant was not worth over thirty-five per cent. of that amount. He further said that he had made a return to the State board of equalization showing that defendant owned property in Missouri subject to taxation on June 1st, 1898 of the value of $541,472.40.

The trial court found and decided that the term "all other property," embraced franchises derived from the Federal Government, which were non-taxable by reason of such derivation, and that the defendant is a governmental agent and instrument of interstate commerce, exercising its rights in Missouri solely by virtue
98 of such Federal authority, and so held that the tax based upon the assessment of "all other property at $856,400.56," was void, but, "that the assessment and valuation made by the State broad of equalization upon the poles, wires and instruments owned by the defendant in this State is final and conclusive, and is not subject to review or attack in this suit."

Both parties appealed.

I.

The defendant contends that it has been discriminated against, contrary to the provisions of section 4 of article 10 of the constitution of Missouri, and of the 14th amendment to the Constitution of the United States: in this, that the constitution of Missouri relied on, provides that "all property subject to taxation shall be taxed in proportion to its value," and the 14th amendment to the Constitution of the United States prohibits any State to deny any person within its jurisdiction the equal protection of the laws, and that the State board of equalization has assessed defendant's property at its full value, while the local assessors throughout the State have only assessed the property of other persons at from thirty-five to forty per cent. of its value.

In support of its contention the defendant cites, a great number of cases, among them, Cummings *v.* National Bank 101 U. S. 153; Nashville R. R. Co. *v.* Taylor, 86 Fed. 168; National Bank *v.* Kimball 103 U. S. 732; Pelton *v.* National Bank, 101 U. S. 143; Balfour *v.* City of Portland, 28 Fed. 738; Trustees of Cincinnati So. R. R. *v.* Guenther, 19 Fed. 395; Chicago, Burlington & Q. R. R. Co. *v.* Board &c. 67 Fed. 411; Railroad *v.* Board, 54 Kansas, 781; Stanley *v.* Supervisors 121 U. S. 535.

The principle here contended for is tersely expressed by Mr. Justice Miller in the case of National Bank *v.* Kimball, 103 U. S. 732, as follows: "It is held in these opinions that when the inequality of valuation is the result of a statute of the State designed to
99 discriminate injuriously against any class of persons or any species of property, a court of equity will give appropriate relief, and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation the necessary result of which is to tax one species of property higher than others and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors

and no general rule or discriminating rate adopted by a single assessor, but relies on numerous instances of partial and unequal valuations which establish no rule on the subject."

The defendant has not brought itself within the rule announced in those cases, for it has shown no combination among assessors and no course of conduct among them to discriminate against the defendant or other telegraph companies and other property owned by citizens generally. It has only shown by the testimony of one member of the State board of equalization that in his judgment the valuation put upon property generally is only thirty-five or forty per cent. of its true value. The law contemplates that for purposes of taxation property shall be assessed at its true value in money (R. S. 1899 § 9180), and it also presumes that all officers do their duty. Agan *v.* Shannon, 103 Mo. 661; State *ex rel. v.* Bank, 120 Mo. 161; Mathais *v.* O'Neill 94 Mo. 520. The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct. It is only enough to show what the witness believed to be the value of the property, but not enough to convict the local assessors of intentional or systematic violation of duty.

But aside from this the cases relied on also establish another rule, which is voiced by Mr. Justice Field, in Stanley *v.* Supervisors, 121 U. S. 535, that when the statutes of the State provide a board for the correction of error and irregularities of assessors in the
100 assessment of property for the purpose of taxation, the official action of that body is judicial in character and its judgments are not open to attack collaterally, but, "when the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations *a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due.*" To the same effect are Cummings *v.* Bank, 101 U. S. 153; Balfour *v.* City of Portland, 28 Fed. 738; Pelton *v.* Bank, 101 U. S. 143; Trustees &c. Railroad *v.* Guenther, 19 Fed. 395; Railroad *v.* Board, 67 Fed. 411.

The defendant cannot avail itself of these cases, for the reasons, 1st, that it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; 2d that such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case. It simply alleges a discrimination or excessive tax, and then seeks to defeat the whole assessment without paying or tendering anything, notwithstanding it admits by its answer and its proofs that it has property in this State subject to taxation of the value of $541,472.40. Upon the authority of the cases relied on by it, this cannot be done. It results that defendant's appeal is without merit, and the judg-

ment of the circuit court upon this branch of the case is right and must be affirmed as to defendant's appeal.

II.

The trial court held that the item "all other property at $856,400.56," included franchises which were derived from the Federal Government, and were non-taxable by reason of such derivation, and that the defendant is a governmental agent and an
101 instrument of interstate commerce exercising its rights in Missouri solely by virtue of such Federal authority, and hence held that the portion of the tax sought to be recovered which was based upon this item could not be legally charged on defendant. From this the plaintiff appealed.

The defendant is a corporation organized under the laws of the State of New York. It has never received any authority or right or permission from the State of Missouri to do business in this State or to erect its poles or string its wires on, over or upon the public highways and places in this State. Ever since 1865 (R. S. 1865 ch. 65 p. 349, sec. 5) there has been a statute in this State authorizing any telegraph company *organized under the laws of this State*, to place its poles and wires along, over and upon the public highways. But there is not now, and never has been any law of this State granting any such franchise or permission to any foreign telegraph company. The defendant's sole right to do business in Missouri arises out of the act of Congress approved July 14th, 1866 (U. S. Stats. at Large 1865–'67 pp. 221–'22).

Briefly stated that act gives the defendant the right to maintain its system of telegraph along the military and post roads of the United States, and over, under, and across all navigable streams of the United States, and requires the defendant to transmit and give priority to messages of the Government between its various departments, officers and agents, at rates to be annually fixed by the Postmaster General, and further requires the defendant to sell its entire system to the Government at any time upon a valuation to be fixed by appraisers. The defendant accepted the provisions of this act and has ever since been operating under it.

But while this act has been held to be a legitimate regulation of commerce between the States and to constitute the defendant, *as to Government business a Government agency*, and an instrument of interstate commerce, (Pensacola Tel. Co. *vs.* Western Union Tel. Co.
102 96 U. S. 1; Telegraph Co. *vs.* Texas, 105 U. S. 460); nevertheless it is equally as well established that; "The property of a telegraph company within a State is subject to State taxation like all other property. The fact that the company is engaged in interstate commerce, or that it is an agent of the Government, can afford no immunity from the taxation of its property." 25 Am. & Eng. Enc. Law (1st ed.) p. 873 and cases cited. Western Union Tel. Co. *vs.* Texas, 105 U. S. 464; Western Union Tel. Co. *vs.* Taggart, 163 U. S. 1; Western Union Tel. Co. *vs.* Mass., 125 U. S. 530, and 141 U. S. 40.

The plaintiff relies, principally, upon the cases of Western Union

Telegraph Co. *vs.* Massachusetts, 125 U. S. 530, and the Same *vs.* Same 141 U. S. 40. The syllabi in those cases express clearly the points decided. In the first case (125 U. S. 530) the syllabus is as follows:

"The privilege conferred upon telegraph companies by Rev. Stat. § 5263 carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph.

The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. Stat. § 5263, nor by the commerce clause of the Constitution.

The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust.

A State statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another
103 State, whose taxes are in arrear from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has accepted the provisions of Rev. Stat. § 5263 from operating its lines over military and post roads of the United States."

In the second case (141 U. S. 40) the syllabus is as follows:

"The tax imposed by the statutes of Massachusetts, (Pub. Stat. c. 13, §§ 40, 42) requiring every telegraph company owning a line of telegraph within the State to pay the State treasurer 'a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock,' deducting such portion of that valuation as is proporti-nal to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State, is in effect a tax upon the corporation on account of property owned and used by it within the State; and is constitutional and valid, as applied to a telegraph company incorporated by another State, and which has accepted the rights conferred by Congress by § 5263 of the Revised Statutes."

It will thus be observed that in the first case it was held proper to tax the tangible property of the company in that State, and that "the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines." And in the second case it was held proper to require the company to pay "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock," "deducting such portion of that valuation as is proporti-nal to the length of its lines without the State, and deducting also an amount equal to the value

of its real estate and machinery subject to local taxation within the State." This method of taxation was expressly authorized by the statute of that State.

It was argued in the last case cited that such a tax was a
104 tax upon its right or franchise derived from the act of Congress and hence was a tax on its franchise and not on its property. But the Supreme Court of the United States held that such a method of taxation was not a tax on its franchise, but was only a method to ascertain the value of the tangible property located in the State of Massachusetts.

Mr. Justice Gray, delivering the opinion of the court said:

"But this court, in answering that argument and upholding the validity of the tax, affirmed the following propositions:

The franchise of the company to be a corporation, and to carry on the business of telegraphing, was derived not from the act of Congress, but from the laws of the State of New York, under which it was organized; and it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State, and to erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to the support of the government of that State.. 125 U. S. 547, 548.

By whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. 125 U. S. 547.

The tax, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for
105 ascertaining the value of that property. Such a tax is not forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution, 125 U. S. 552.

The statute of Massachusetts is intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other State; and the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not an unfair or unjust one; and the details of the method by which this was determined have not exceeded the fair range of legislative discretion. 125 U. S. 553.

That decision was cited by the court in Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411, 426, 427, and in Leloup *v.* Mobile, 127 U. S. 640, 649."

The rules established by the adjudications may be stated to be: 1st, that the Western Union Telegraph Co. is as between governmental departments, a governmental agency, but it is not so as between the company and a State or a citizen; 2d, that the telegraph company is an instrument of interstate commerce, and has a right to enter a State and transact business; 3d, that the telegraph company being an instrument of interstate commerce, and deriving its powers in this regard from the United States, no State has a right to prevent such company from doing business in the State, for that would be an interference with interstate commerce, 4th, that the tangible property of the telegraph company located in a State is subject to taxation like any other property in that State, and its franchise or right derived from the act of 1866 does not exempt such property from taxation by the State in which such property is located; 5th, that in determining the value of the tangible property of the company located in any State, it is proper to compare the length of its lines in that State with the length of its entire lines, or

106 to take the aggregate value of the shares of its capital stock, and deduct therefrom such portion of that valuation as is proportional to the length of its lines without the State, and also to deduct therefrom the value of its real estate and machinery subject to local taxation within the State. And that such taxes, so assessed, constitute an excise tax upon the property or capital of the corporation and not a tax upon any franchise of the corporation.

In the case at bar the board of equalization first ascertained the number of miles of poles and wires and the number of instruments owned by the defendant, and used in this State, and placed a valuation upon them. The board then considered "all other property" owned by the defendant located in this State and put a valuation upon that. The defendant's evidence shows that it did own other property in this State besides the poles, wire and instruments specially enumerated and valued. But it contends that such other property was worth only one thousand dollars and not $856,400.56, a the board found it to be worth. The utmost that could therefore be said of this item is that the defendant and the board differed in opinion as to the value of such other property, and this being an action at law wherein the defendant attempts to defeat the whole levy, as long as it appears that the defendant owned *some* property and the only question is whether it was of the one value or the other, the defense must fail, for a court of law has no machinery for determining how much such property was really worth, and in addition if all defendant claims be true it is merely a case of overvaluation and not an erroneous assessment, and under the law of this State mere overvaluation is no defense to a suit upon a tax bill, for section 7579 R. S. 1889 (sec. 9197 R. S. 1899) expressly provides that: "Valuations placed on property by the assessor or board of equalization shall not be deemed to be erroneous assessments under this section."

107 But aside from this such a defense is not available to the defendant in a suit upon the tax bill in a court of law, but "a party aggrieved may resort to a court of equity to restrain the

exaction of the excess, upon payment or tender of what is admitted to be due." Stanley *v.* Supervisors, 121 U. S. 535. This the defendant has wholly failed to do. It admits it owns some property that is subject to taxation other than that specifically enumerated, and it has not sought the aid of a court of equity to relieve it against the claimed excessive tax, nor has it paid or offered to pay the tax upon the other property it admits it owes, even upon its own basis of valuation thereof. So that even if this was an appropriate proceeding in equity, the defendant has not brought itself within the rule entitling it to relief as laid down by the Supreme Court of the United Sates.

The defendant, however, contends, and the trial court found, that "all other property at $856,400.56," included franchises which were derived from the Federal Government and were non-taxable by reason of such derivation, and that the defendant is a governmental agent and an instrument of interstate commerce, exercising its rights in Missouri solely by virtue of such Federal authority, and hence that court held that the portion of the tax based upon this item of assessment could not be recovered.

The trial court was right in holding that the defendant is a governmental agent, but this only extended to its relations between the Government and its agent. The trial court was also right in holding that the defendant is an instrument of interstate commerce. But the trial court was in error in holding that the defendant derived its franchise—that is, its right to exist and be a corporation and do a telegraph business—from the Government of the United States. That franchise is derived from the State of New York, and not from the Government of the United States. Neither the act of Congress of 1864, nor its acceptance by the defendant, created
108 the defendant or gave it the right to do business. The defendant was created by the laws of New York twelve years before the Federal statute was enacted. The defendant was obliged to be a telegraph company or engaged in that business before it could accept the provisions of that act. It could not be created a telegraph corporation by the Government of the United States or at any rate it had not been so created. The fact that it is an instrument of interstate commerce or that it had accepted the act of 1864, did not exempt its property in this State from taxation, 25 Am. & Eng. Ency. Law (1st ed.) p. 873; Western Union Tel. Co. *vs.* Texas 105 U. S. 464; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1; Western Union Tel. Co. *v.* Mass., 125 U. S. 530; *Ibid v. Ibid*, 141 U. S. 40.

So that, when, in determining the value of the property of the defendant in this State, the board of equalization took into consideration "the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof," it did not and could not have included therein any franchise derived by the defendant from the Government of the United States, because that Government had conferred

no such franchise; nor was such a valuation placed upon "all other property," a tax upon the franchise of the defendant company. The franchise derived by the defendant from the State of New York was considered by the board in determining the value of the property of the defendant located in this State. That is, that property was valued not as so many poles, so much wire, so many instruments or so much "other property," in the abstract, but was valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which being brought into relation towards each other—into a *system*, located partly in this State and partly in other States, gave each part a concrete value, which was
109 much greater than its abstract value. The right to exist—the franchise—of the defendant was property, and was subject to taxation, either directly, in the proportion that the portion of the franchise exercised in this State bore to the proportion of the franchise exercised in all other States, or indirectly, as was done in Massachusetts and as was done here, by being impressed upon the tangible property owned by it, thereby increasing its value, and by considering the franchise and its tangible property as a system, and then assessing the part of the property forming a part of the system and located in Missouri as of its proportionate value of the whole property constituting the system. This was expressly held to be proper in Western Union Tel. Co. *v.* Mass. 125 U. S. 530. The rule approved in Western Union Tel. Co. *v.* Mass. 141 U. S. 40, accomplishes the same result, for it is "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares of its capital stock," deducting such proportion of that valuation as is proportional to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State. This is only another method of adding the value of the franchise to the value of the property located in the State, and thereby taxing its concrete value, which is its real value, and the value at which it could be sold.

It will not do to say, as the defendant does, that the poles, wire and instruments could be replaced new at a cost of $984,357.89, and that all its other property in this State is only worth $1,000. Those sums may represent the value of the property in the abstract, but they do not represent the value of the property in the concrete, because as a part of a system a greater value is necessarily impressed upon the abstract property, and thereby the property becomes, it may be, worth many times as much as it would be if considered in the abstract. No injustice is done to the defendant in so valuing it, because the defendant so uses it, and treats it, and because it
110 is worth more, for it would sell for more as a necessary part of a system than it would if it was sold in the abstract or than if it had no such relation to the other parts of the system. In other words the defendant values it for taxation at its abstract value, while it enjoys it and derives profit from it according to its concrete value. It follows that the judgment of the circuit court holding that the tax assessed against "all other property at $856,400.56" to be unlawful, is erroneous, and that the plaintiff is entitled to a judg-

ment for the whole amount of the tax sued for. Judgment is accordingly entered for the plaintiff here for $1027.22, back taxes for the year 1899, with interest thereon from the first of January 1900 at the rate of one per cent. per month (R. S. 1899 sec. 9225) and costs. All concur.

W. C. MARSHALL, *J.*

And afterwards to wit, on the 29th day of January, 1902, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* CHRIS GOTTLEIB, Collector, etc., Pl'ff, App.,
vs.
WESTERN UNION TELEGRAPH Co., Def't, App.

Now at this day, there is presented to the Honorable Gavon D. Burgess, chief justice of the supreme court of the State of Missouri, in chambers, a petition for a writ of error to the Supreme Court of the United States, a citation directed to the said plaintiff appellant, citing and admonishing him to appear at a Supreme Court of the United States on the 28th day of February, 1902, and a bond in the sum of three thousand dollars; which said writ of error is allowed, said citation signed, said petition and assignment of errors filed and said bond approved, ordered filed and made a part of the record herein.

111 Which said petition for writ of error is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1902.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLIEB, Collector, Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Appellant.

Now comes the Western Union Telegraph Company, appellant, and respectfully says that it feels aggrieved by the proceeding and judgment of this honorable court in the above-entitled cause, and that it believes this honorable court has committed the following errors in said cause, to wit:

1. The court erred in said cause in deciding that appellant was not discriminated against by the State board of equalization of Missouri in assessing for purposes of taxation the property of said Western Union Telegraph Company at more than its full and actual value, whereas said board intentionally and systematically equalized and adjusted the values of real and personal property, generally for purposes of taxation, at 40 % of the actual values of such property, all of which appellant set up and claimed was in violation of the fourteenth amendment to the Constitution of the United States.

2. The court erred in refusing to hold that the franchises, exercised by appellant in the State of Missouri, were derived wholly

act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other
112 purposes" and that said State board of equalization taxed said franchises in violation of the provisions of the Constitution of the United States.

3. The court erred in refusing to hold that the item involved in the assessment complained of in said cause, under the head of "all other property" and amounting to the sum of $856,400.56 was, in fact, an assessment of the franchises of appellant, derived from the Federal Government in pursuance of the act of Congress mentioned in the error last assigned and, therefore, violative of the laws of the United States and of the provisions of the Constitution of the United States.

4. The court erred in failing to find that the only franchises exercised by appellant in the State of Missouri were those derived from the act of Congress mentioned and that the same were not subject to taxation by the State board of Missouri through said board of equalization, or otherwise.

5. The court, having found and held that plaintiff in error was a governmental agent and an instrument of interstate commerce, erred in holding that the item "all other property," hereinbefore mentioned, did not embrace franchises of appellant derived from the Government of the United States and that the same had been taxed in said item in violation of the laws of the United States of section 8, article 1 and other provisions of the Constitution of the United States.

6. The court erred in rendering judgment in favor of appellant for the amount sued for.

7. The court erred in refusing to entertain the defenses made by appellant in said cause for the alleged reason that no tender, of any part of the taxes involved, had been made by appellant to appellant.

8. The court erred in reversing the finding and judgment of the circuit court of Jackson county, Missouri.

Wherefore, the premises considered, this appellant prays
113 that it may be awarded a writ of error by this honorable court, issuing out of the Supreme Court of the United States, addressed to this honorable court for the purpose of enabling said Supreme Court of the United States to examine and correct the errors assigned and for such other and further proceedings as to said Supreme Court of the United States may seem proper.

KARNES, NEW, HALL & KRAUTHOFF,
DICKSON & SMITH,
Attorneys for Western Union Telegraph Company.

And which said assignment of errors in in words and figures as follows, viz:

In the Supreme Court of the United States, October Term, 1902.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLIEB, Collector, Defendant in Error,
vs.
WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error.
} Assignment of Errors.

Now comes The Western Union Telegraph Company, plaintiff in error, by its counsel and respectfully represents that it feels ag-rieved by the proceedings and judgment of the supreme court of the State of Missouri in the above-entitled cause and assigns error thereto, as follows:

1. The court erred in said cause in deciding that plaintiff in error was not discriminated against by the State board of equalization of Missouri in assessing for purposes of taxation the property of said Western Union Telegraph Company at more than its full and
114 actual value, whereas said board intentionally and systematically equalized and adjusted the values of real and personal property, generally for purposes of taxation, at 40 % of the actual values of such property, all of which plaintiff in error set up and claimed was in violation of the fourteenth amendment to the Constitution of the United States.

2. The court erred in refusing to hold that the franchises, exercised by plaintiff in error in the State of Missouri, were derived wholly from the act of Congress, approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes" and that said State board of equalization taxed said franchises in violation of the provisions of the Constitution of the United States.

3. The court erred in refusing to hold that the item involved in the assessment complained of in said cause, under the head of "all other property" and amounting to the sum of $856,400.56 was, in fact, an assessment of the franchises of plaintiff in error, derived from the Federal Government in pursuance of the act of Congress mentioned in the error last assigned and, therefore violative of the laws of the United States and of the provisions of the Constitution of the United States.

4. The court erred in failing to find that the only franchises exercised by plaintiff in error in the State of Missouri were those derived from the act of Congress mentioned and that the same were not subject to taxation by the State board of Missouri through said board of equalization, or otherwise.

5. The court, having found and held that plaintiff in error was a governmental agent and an instrument of interstate commerce, erred in holding that the item "all other property," hereinbefore mentioned, did not embrace franchises of plaintiff in error derived from the Government of the United States and that the same had been taxed in said item in violation of the laws of the United
115 States of section 8, article 1 and other provisions of the Constitution of the United States.

6. The court erred in rendering judgment in favor of defendant in error for the amount sued for.

7. The court erred in refusing to entertain the defenses made by plaintiff in error in said cause for the alleged reason that no tender, of any part of the taxes involved, had been made by plaintiff in error to defendant in error.

8. The court erred in reversing the finding and judgment of the circuit court of Jackson county, Missouri.

Wherefore, plaintiff in error prays this honorable court to examine and correct the errors assigned and for a reversal of the judgment of the supreme court of the State of Missouri, entered in the above-entitled cause with directions to said supreme court of Missouri to remand said cause with directions to said circuit court of Jackson county to retry said cause and award judgment against plaintiff in error for not to exceed 40% of the amount fixed by said State board of equalization as the value of the property of plaintiff in error in Missouri on June 1st, 1898, consisting of the poles, wires and instruments to it belonging.

KARNES, NEW, HALL & KRAUTHOFF,
ELENEIOUS SMITH,
DICKSON & SMITH,
Attorneys for Plaintiff in Error.

And which said bond is in words and figures as follows, viz:

Know all men by these presents, that we, The Western Union Telegraph Company and Russell Sage are held and firmly bound unto the State of Missouri at the relation of the collector of the revenue for Jackson county, Missouri, in the full and just sum
116 of three thousand dollars ($3000.00) to be paid to the said collector of the revenue, or his successor in office, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of January, in the year of our Lord one thousand nine hundred and two.

Whereas, lately, at the October term, 1901, of the supreme court of the State of Missouri, in a suit pending in said court between The State of Missouri at the relation of Chris Gottlieb as collector of the revenue for Jackson count, Missouri, plaintiff and The Western Union Telegraph Company, defendant, judgment was rendered against the said Western Union Telegraph Company and the said Western Union Telegraph Company *has* obtained a writ of error out of the Supreme Court of the United States to said court to reverse the judgment in the aforesaid suit and a citation directed to said State of Missouri, at the relation of said Chris Gottlieb as collector of the revenue for the county of Jackson, State of Missouri, and admonishing said State of Missouri at the relation of said Chris Gottlieb, collector of the revenue for the county of Jackson to be and appear in the Supreme Court of the United States at the city of Washington, thirty (30) days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Western Union Telegraph Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

117 THE WESTERN UNION TELEGRAPH CO.,

[SEAL.] By THOS. F. CLARK, *Vice-President.*

RUSSELL SAGE. [SEAL.[

Attest: A. R. BREWER, *Secretary.*

Sealed and delivered in presence of—

E. A. MACCLEAN,

[SEAL.] *Notary Public, N. Y. Co., No.* 1.

Approved by—

G. D. BURGESS,

Judge and Chief Justice of the Supreme Court of the State of Missouri.

STATE OF MISSOURI, *sct:*

I, John R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the record and proceedings had and made in said court in the cause of The State of Missouri at the relation of Chris Gottleib against The Western Union Telegraph Company as fully as the same remain on file and of record in my office.

In testimony whereof, I hereunto set my hand and *and* affix the seal of said court at the city of Jefferson, this 5th day of February, 1902.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No. 18,423. Missouri supreme court. Term No. 256. The Western Union Telegraph Company, plaintiff in error, *vs.* The State of Missouri at the relation and to the use of Chris. Gottlieb, collector of the revenue for Jackson county, Missouri. Filed February 26th, 1902.